Petition

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Supreme Court, U.S.
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No. 81-_____

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

* * *

W.J. ESTELLE, JR.,
Petitioner

V.

CHARLES EDWIN BULLARD,
Respondent

* * *

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

* * *

PETITION FOR WRIT OF CERTIORARI

* * *

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QUESTIONS PRESENTED

(1) Are *Burks v. United States*, 437 U.S. 1 (1978), *Greene v. Massey*, 437 U.S. 19 (1978), and *Bullington v. Missouri*, 451 U.S. 430 (1980), applicable to Texas habitual offender sentencing procedures?

(2) Could a rational trier of fact have found that Respondent Bullard committed the two prior felonies used to enhance his punishment?

(3) Are *Burks v. United States*, *Greene v. Massey*, and *Bullington v. Missouri*, retroactive?

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On Petition For Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

* * *

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W.J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner herein, by and through his attorney, the Attorney General of Texas, and requests that the Court grant this his petition for writ of certiorari, and as grounds therefor, would respectfully show the Court the following:

OPINIONS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, on August 27, 1980, entered a judgment and memorandum order granting Respondent Charles Edwin Bullard's application for writ of habeas corpus under 28 U.S.C. §2254. (Appendix A). Petitioner's timely filed motion for new trial was denied in a memorandum order filed on September 26, 1980. (Appendix B). Both the district court's rulings are published in *Bullard v. Estelle,* 502 F.Supp. 887 (N.D. Tex. 1980). On January 20, 1982, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment in an opinion (Appendix C) published as *Bullard v. Estelle,* 665 F.2d 1347 (5th Cir. 1982).

JURISDICTION

The Court has jurisdiction to review the judgment of the Court of Appeals entered January 20, 1982, under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Since this case presents double jeopardy questions, the Fifth and Fourteenth Amendments to the United States Constitution are involved.

STATEMENT OF THE CASE

Respondent Charles Edwin Bullard pled not guilty to felony theft before a jury and trial began on April 14, 1975. The following day, the jury found him guilty. Pursuant to Bullard's written election, the jury was excused and the trial judge himself conducted the punishment hearing. By virtue of his two prior felony convictions, Cause Nos. C-70-6579-MN, and D-7519-JI, Bullard was charged with being a habitual offender

under Texas law, Tex. Penal Code Ann. §12.42(d). *See, Rummel v. Estelle,* 445 U.S. 263 (1980).

Deputy Sheriff John Slovak, a fingerprint expert from the Dallas County Sheriff's Department, testified that he had taken Bullard's fingerprints earlier that day. He testified that in the supporting documents of each prior conviction, one Charles Edwin Bullard was the man named as the convicted defendant. Further, each prior conviction contained a set of fingerprints. Bullard's fingerprints taken the day of trial were identified as State's Exhibit No. 1. The conviction and fingerprints in Cause No. C-70-6579-MN were identified as State's Exhibit No. 2. The record of the conviction and fingerprints in Cause No. D-7519-JI were identified as State's Exhibit No. 3. Slovak then testified as follows:

Q: (By Mr. Walker [Assistant District Attorney]) Deputy Cron [sic], would you compare the—Deputy Slovak, excuse me—would you compare the prints that is on State's Exhibit No. 1 to the exhibit that is on State's Exhibit No. 2?

A: (By the witness [John Slovak]) Yes, sir, I did.

Q: O.K. Have you done that?

A: Yes, I have.

Q: I'll ask you if those prints were made by one in the same person?

A: Yes, sir, they were.

Q: Is there any doubt in your mind that those were made by anyone else other than the Defendant in this cause?

A: No, sir.

Q: Again, I'll ask, do those records indicate a Charles Edwin Bullard was convicted in Cause No. D-7519-JI?

A: Yes, sir.

Q: And also in Cause No. C-70-6579-MN?

A: Yes, sir.

Bullard did not testify or present any other controverting evidence. His attorney did not object to the proof. The trial court found that he was the same person previously convicted in the prior convictions alleged for enhancement and accordingly assessed punishment at life imprisonment.

On appeal the Texas Court of Criminal Appeals held this proof inadequate to show that Bullard was the same man convicted in Cause No. D-7519-JI because "at no time did Deputy Slovak testify that the fingerprints he had taken of the Appellant were made by the same person whose fingerprints appeared on State's Exhibit No. 3." *Bullard v. State*, 533 S.W.2d 812, 816 (Tex.Crim.App. 1976). In accordance with state law, the court remanded for a new punishment hearing.

At the time of the remand, the record reflects that the district attorney's office in Dallas County had several other felony indictments pending against Bullard for burglary of a habitation and burglary of a vehicle, both felonies. After the court conducted a new sentencing hearing on March 26, 1976, free of any infirmity and resulting in another life sentence, these other indictments were dismissed in accordance with the district attorney's ordinary practice.

Again Bullard appealed, and the Court of Criminal Appeals affirmed both the conviction and the life

sentence. *Bullard v. State*, 548 S.W.2d 13 (Tex.Crim.App. 1977).

After exhausting his state court remedies, Bullard on April 17, 1978, filed his ultimately successful federal habeas corpus application. The Fifth Circuit Court of Appeals on January 20, 1982, affirmed the granting of the writ. These proceedings followed.

SUMMARY OF THE ARGUMENT

The basis of Respondent Bullard's initial remand for a new punishment hearing in the Texas Court of Criminal Appeals was not of the sort intended to be encompassed by the holdings in *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978). Properly considered, his reversal was based more upon a form of evidentiary error than general insufficiency of the evidence, at least in the constitutional sense defined by *Jackson v. Virginia*, 443 U.S. 307 (1979). It cannot reasonably be concluded that no rational fact finder could have found that Bullard was the same person convicted in the prior felonies. Clearly the identity of names, partial identity of fingerprints, and total lack of evidence, argument, or objection by Bullard would be sufficient for a rational trier of fact to conclude that he was the man named in the papers documenting the prior convictions.

Burks and *Greene* have no applicability to the punishment stage of a bifurcated trial in Texas. A convicted felon does not have a valid expectation of finality attendant to an erroneously imposed sentence. Although it is sometimes said that the double jeopardy clause protects against multiple punishments as well as multiple convictions, Petitioner has received only one punishment, not two; every day he has spent in custody has been credited toward his eventual life sentence, the only one he must serve. The double jeopardy considerations barring a se-

cond forbidden prosecution on guilt or innocence do not prohibit resentencing after a defect in the original proceeding.

In any event, *Burks*, *Greene*, and *Bullington v. Missouri*, 451 U.S. 430 (1981), cannot help Bullard unless they are applied retroactively, and it was error for the district court to hold that they should be so applied. Plainly the Court has held that not all double jeopardy decisions are retroactive. The proper test for deciding whether a double jeopardy decision is retroactive under *Robinson v. Neil*, 409 U.S. 505 (1973), emphasizes the extent of good faith detrimental reliance by law enforcement authorities on the old standards. Here, the good faith aspect of reliance is obvious. The Court found it necessary to overrule many of its own prior cases in handling down the decisions in *Burks* and *Greene*. Those decisions represent a complete reversal of prior precedent.

Detrimental reliance is also shown. Two apparent commonly recurrent prejudicial sets of circumstances emerge. First, at the original trial that ended in reversal, the prosecutor may well have had additional evidence in support of guilt or punishment that he would have presented, except that he was totally unaware and could not reasonably have been aware that that was his last opportunity to do so. Under such circumstances, the prosecutor should not be unfairly penalized for having made a good faith legal judgment with a great deal less than knowledge of all circumstances.

Second, and even more likely, if a criminal defendant's sentence is overturned for insufficient evidence to support proof of his identity as the perpetrator of the prior convictions, the prosecutor on remand may have more than one option. It may be that he can simply conduct a new punishment hearing or, as was true in Bullard's case, he may have had other charges that he could have

brought against Bullard. If he had known that years later, a federal district court construing a decision of this Court would hold that the maximum punishment to which Bullard could be subjected was twenty years—as the district court held in this case—then the prosecutor might well have brought other charges against Bullard in order to increase the punishment. But the prosecutor had no inkling of such legal eventualities, nor can it reasonably be argued that he should have had such foresight.

So the prosecutor here, like many others elsewhere, abandoned other prosecutions in order to complete the initial prosecution. As is commonly the case in such circumstances, the other charges were dismissed upon the obtaining of a final conviction on the original charge. The statutes of limitation have long since run as to such other charges. Detrimental reliance is thus shown.

REASONS FOR GRANTING THE WRIT

I.

BULLARD'S SECOND SENTENCING HEARING AFTER AN APPELLATE REVERSAL FOR INSUFFICIENT EVIDENCE AT HIS FIRST HEARING TO SUPPORT THE TRIAL COURT'S APPLICATION OF THE HABITUAL OFFENDER STATUTE TO HIM DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION.

A.

Burks v. United States, _Greene v. Massey_, and _Bullington v. Missouri_, the cases upon which Bullard relies as establishing a double jeopardy violation, are not applicable to Texas habitual offender sentencing procedures.

Petitioner Bullard's limited reversal and remand in *Bullard v. State*, 533 S.W.2d 812 (Tex.Crim.App. 1976), was not upon the sort of ground intended by this Court to be encompassed within the holdings of *Burks v. United States*, 437 U.S. 1 (1978), and *Greene v. Massey*, 437 U.S. 19 (1978). It is true that in remanding Bullard's case for a new punishment hearing, the Court of Criminal Appeals technically phrased the matter as follows:

"The State's evidence is therefore insufficient to identify the Appellant as the defendant who was convicted in Cause No. D-7519-JI in Criminal District Court No. 2 in Dallas County." *Bullard v. State*, 533 S.W.2d at 816. Nevertheless, in terms of *Burks v. United States* and *Greene v. Massey* analysis, this sort of error is trial type error and not error pertaining to general insufficiency of the evidence. The Court of Criminal Appeals has several times specifically so held in the context of the habitual offender statute. *Girnus v. State*, 595 S.W.2d 118 (Tex.Crim.App. 1980); *Porier v. State*, 591 S.W.2d 482 (Tex.Crim.App. 1980)(*en blanc*).

The pertinent portion of the Fifth Amendment provides:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ... U.S. Const. amend. V.

It strains any reasoned view of reality to assert that punishment is an offense. Habitual offender status is not an "offense" as that term is commonly understood in the criminal law, but only a reason why punishment should be more severe.

It is true that, "[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

Ex parte Lange, 18 Wall. 163, 173, 21 L.Ed. 872, 878 (1874), *quoted in, North Carolina v. Pearce*, 395 U.S. 711, 718 (1969). The district court seized upon such dicta as support for its position. But a careful examination of *Ex part Lange* reveals that the conduct condemned in that case was the imposition of *two separate* punishments where only one was authorized by statute. In *Lange* the trial court erroneously imposed both a fine and imprisonment, even though the Court was authorized under the statute to impose only one or the other of these two punishments. As this Court has recently said: "As *Ex parte Lange* demonstrates, a defendant may not receive a greater sentence than the legislature has authorized." *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980). And the Court has stated that in many circumstances subjecting a defendant to an even *greater* penalty upon retrial does not implicate the double jeopardy clause, although it may implicate the due process clause. *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969). Even *Burks* itself specifically states that an "improper sentence" is a trial-type error, citing an old English case, and one that does not implement the double jeopardy clause. *Burks v. United States*, 437 U.S. 1, 14 n.8 (1978).

As discussed in detail in *Porier v. State*, 597 S.W.2d 482, 483-84 (Tex.Crim.App. 1980) (*en banc*). the punishment phase of a criminal trial involves no "offense" within the meaning of the double jeopardy clause of the Constitution. *Sanabria v. United States*, 437 U.S. 54 (1978), stands for this proposition, as does *Spencer v. Texas*, 385 U.S. 554 (1967). In *Spencer* the Court upheld the use of recidivist statutes against a contention that the statutes themselves violate the double jeopardy clause of the Constitution.

Similarly, the Court of Criminal Appeals in a long and unbroken line of authority has held that both Tex. Penal Code §12.42(d), and its statutory predecessor, Article

63, V.A.P.C., do not violate double jeopardy principles:

> ... As the Court pointed out in *Phariss v. State*, 149 Tex. Cr. App. 489, 196 S.W.2d 826, in rejecting a like contention, the State in alleging the prior convictions was not seeking to again convict the defendant, but was merely seeking to enhance his punishment for the offense for which he was then on trial in the event of conviction. The provisions of the Article did not create an offense, inflict additional punishment for a prior offense, or authorize a conviction on a habitual criminal charge; they merely prescribe more severe punishment based on persistence in crime. 16 Tex.Jur.2nd, Secs. 403 and 404, pp. 624 and 625.

Mullins v. State, 409 S.W.2d 869 (Tex.Crim.App. 1966), *quoted in, Porier v. State*, 591 S.W.2d at 484.

In a concurring opinion to *Greene v. Massey*, 437 U.S. 19, 27 (1978), Mr. Justice Rehnquist cautioned against the overbroad and unreasoned application of the holdings in *Burks* and *Greene:*

> I would want to emphasize more than the Court does in its opinion the varying practices with respect to motions for new trial and other challenges to the sufficiency of the evidence both at the trial level and on appeal in the fifty different States in the Union. Thus, to the extent that Florida practice in this regard differs from practice in the federal system, the impact of the Double Jeopardy Clause may likewise differ with respect to a particular proceeding.

The import of Mr. Justice Rehnquist's admonition suggests a different result in this case. The term "sufficiency of the evidence" is not a talisman that automatically

invokes all the protections of *Burks* and *Greene*. Instead, the federal district court should look to the *substance* of the type of trial error for which the state court reversed the conviction. If the lower court had done so in this case, it would have realized that only by straining state law pertaining to habitual offenders beyond any reasonable interpretation can it be concluded that such matters pertain to any problem concerning sufficiency of the evidence to support proof of offenses that the Court has addressed in *Burks*, *Greene*, or *Jackson v. Virginia*, 443 U.S. 307 (1979).

The very recent case of *United States v. DiFrancesco*, 449 U.S. 117 (1980), strongly supports the State's position. In *DiFrancesco*, the Court upheld against a double jeopardy challenge a federal statute that allowed the government to appeal under certain circumstances a sentence that it regarded as too lenient. DiFrancesco had argued like Bullard in the instant case that since the double jeopardy clause applies to punishment as well as guilt, then he could not be subjected to a second greater punishment at the whim of the government. This Court rejected the claim:

> [O]ur task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of the Court, nor even considerations of double jeopardy policies support such an equation.

United States v. DiFrancesco, 449 U.S. at 132.

The Court's reasoning is instructive. Historically, the Court said, the accused had very little interest in the finality of a sentence, as opposed to the finality of a

criminal judgment. He is constantly subject to changes in his sentence. A criminal sentence may become longer or shorter depending upon the actions of a parole board or other entity with the authority to commute sentences. The Court's own prior decisions had never accorded any great finality to sentences in criminal cases. The Court held that the dissenters in *DiFrancesco* flatly misread *North Carolina v. Pearce* as implicating the double jeopardy clause at all in punishment proceedings. *United States v. DiFrancesco,* 449 U.S. at 135-36 n. 14.

In short, the Court held that a convicted felon has a very minimal valid expectation of finality in his sentence. Because he legitimately has no such expectation, the double jeopardy clause of the Constitution applies only in extremely limited circumstances to resentencing. The double jeopardy clause simply "does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." 449 U.S. at 137. Repeated attempts to find an accused guilty will drain him emotionally and financially. Having once been found innocent, he may unfairly be cast again into the fray, and have to defend himself and his reputation anew. No such dilemma is posed for the convicted felon who must simply relitigate the proper range of punishment. He already stands convicted; the only remaining question is the appropriate punishment. Since he knows that he is going to prison, his interest, if any, in not having to defend against more than one attempt to incarcerate him for the maximum amount of time is significantly diminished. It should lead to a different result in this case from in one involving insufficiency of the evidence at the guilt or innocence stage of trial.

The Court of Appeals rejected these arguments and instead relied upon *Bullington v. Missouri,* 451 U.S. 430 (1981), in which this Court applied *Burks* and *Greene* to

Missouri capital punisment procedures. The Court of Appeals accurately noted numerous similarities between the Missouri procedures and Texas procedures at the punishment stage of an alleged habitual offender's trial.

In light of these similarities, Petitioner would be inclined to concede that if the state trial judge had found the State's evidence insufficient upon punishment and consequently assessed a punishment less than life imprisonment, the State would have had no second opportunity to prove its case. A different result should follow, however, from the *appellate* court's reversal.

The Court of Appeals pointed out that with respect to guilt or innocence, it is an irrelevant distinction under *Burks* and *Greene* whether the evidentiary insufficiency is found by the trial or appellate court. *Bullard v. Estelle*, 655 F.2d at 1361-62 n. 30. Petitioner here contends that precisely because of the decreased expectation of sentencing finality by a criminal defendant, the distinction is a valid one in a punishment context. Since Respondent Bullard continuously remained in jeopardy of receiving life imprisonment, the double jeopardy clause should not be construed as barring that punishment.

B.

A rational trier of fact could have found beyond a reasonable doubt that Respondent Bullard was the same man as the Defendant convicted in the two prior felonies alleged for enhancement.

This is a federal habeas corpus case brought under 28 U.S.C. §2254. In such cases, this Court has held that the applicable standard by which the sufficiency of the evidence must be measured is whether a rational trier of

fact could have found the habeas petitioner guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

In Respondent Bullard's first sentencing hearing, proper documentation of both prior convictions was in fact introduced into evidence. These documents showed that one Charles Edwin Bullard had been convicted in accordance with the allegations in the indictment. Further, a fingerprint expert testified that he had taken Bullard's fingerprints the day of trial and that he had compared them to the fingerprints in the documents supporting the prior convictions. Read closely, as found by the Court of Criminal Appeals on direct appeal, he specifically testified that Bullard's actual fingerprints matched those on one of the two prior convictions. Apparently the prosecutor simply neglected to ask him whether Bullard's fingerprints also matched those on the other prior conviction, although of course all three sets of fingerprints would have been available for the jury's perusal, as well as the documentation of the prior convictions themselves.

Further, Bullard did not object to the jury's charge at the punishment phase on the ground that the evidence was insufficient to show that he was the man named in the prior convictions. His counsel made no such argument to the jury at the close of the punishment phase of trial. Bullard himself did not testify at that phase of trial. In fact, even his appellate counsel only vaguely raised the matter in the Texas Court of Criminal Appeals. Under these circumstances, it cannot be concluded that a rational trier of fact could not have found that Bullard had committed the prior offenses.

The Court of Appeals disagreed with this analysis only because the Texas Court of Criminal Appeals had already held the evidence insufficient on direct appeal. *Bullard v. Estelle*, 665 F.2d at 1360 n. 27. The state ap-

pellate court's standard of review, however, was not that prescribed in *Jackson v. Virginia;* consequently, the state court's determination cannot represent the "law of the case." The Court of Appeals erred in not applying the *Jackson v. Virginia* standard to Bullard's trial or requiring the district court to do so.

C.

The holdings in *Burks v. United States, Greene v. Massey,* and *Bullington v. Missouri,* are not retroactive.

In *Burks v. United States,* 437 U.S. 1 (1978), and *Greene v. Massey,* 437 U.S. 19 2151 (1978), this Court overruled a long line of its own authorities in order to hold that the Double Jeopardy Clause of the United States Constitution bars retrial when a criminal defendant has obtained an appellate reversal of his case because of insufficiency of the evidence. The Court reasoned that if the evidence were illegally insufficient at trial, then theoretically the case should never have been submitted to the jury at all, but instead any defendant who at the close of the State's evidence moved for an instructed acquittal would have been entitled to one.

For this reason, the Court held that all defendants are entitled to the double jeopardy benefits of the State's failure to prove sufficient evidence at its initial opportunity. The Court, however, failed to rule explicitly whether its holding would apply retroactively so as to invalidate the convictions of all defendants who had already been retried and reconvicted in criminal proceedings supported by sufficient evidence and free of any other constitutional infirmity.[1] The same is true in

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1. It is worth noting that there are numerous reasons why the State during the second prosecution might adduce constitutionally suffi-

(footnote continued on following page)

Bullington v, Missouri, 451 U.S. 430, where the Court applied *Burks* and *Greene* to Missouri capital sentencing procedures.

The criteria for determining retroactivity of double jeopardy decisions were set out in *Robinson v. Neil,* 409 U.S. 505 (1973). At issue there was the retroactivity of the double jeopardy holding in *Waller v. Florida,* 397 U.S. 387 (1970).

The Supreme Court noted that the analysis embodied in *Linkletter v. Walker,* 381 U.S. 618 (1965), which is based upon protecting "the very integrity of the fact-finding process,"[2] *id.* at 639, is "not appropriate" in the

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(footnote continued from previous page)

cient evidence after failing to do so during the first. Of some importance is the possibility that the passage of time might produce additional evidence. More significantly, the State often possesses inculpatory and often damning evidence that it chooses not to introduce because it may be held inadmissable on appeal. The evidence may be a fruit of a search that the State fears will ultimately be held improper, or a confession that might on appeal be held coerced. The evidence may be of arguable but less than certain admissibility for many other reasons that may cause the prosecution to seek a conviction without it.

It is also possible that the State may withhold weak but legally sufficient evidence because it chooses to rely in good faith but erroneously upon evidence that ultimately on appeal is held to be inadmissable. *See, United States v. Block,* 590 F.2d 535, 540 n. 12 (4th Cir. 1978); Comment, 31 U.Chi.L.Rev. 365 (1964).

2. This analysis, as summarized in *Stovall v. Denno,* 388 U.S. 293 (1967), emphasizes the purpose to be served by the new standards, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. *Desist v. United States,* 394 U.S. 244 (1969).

context of double jeopardy decisions, *Robinson v. Neil* at 509. The Court continued to note, however, the "element of reliance embodied in the *Linkletter* analysis...".

Thus, the Court, cautioning against the view that its rule of decision "is an ironclad one that will invariably result in the easy classification of cases in one category or another,"[3] *id.* at 509, established a two-prong good faith reliance and prejudice test. This test focuses first on whether the State's reliance on the prior rule was supported by case law such that the new constitutional decision "marked a departure from past decisions of this Court." *Robinson v.Neil* at 511. If so, the State's reliance upon earlier constitutional decisions, both state and federal, would obviously be in good faith. Second, the Court felt it important to examine the nature and form of prejudice the State would suffer from retroactive application of the constitutional rule and the

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3. Indeed, in the most recent double jeopardy-retroactivity cases located by the State, some have held this Court's double jeopardy decisions to be retroactive, and some refused to do so. In *Mizell v. Attorney General of New York*, 586 F.2d 942 (2d Cir. 1978), *cert. denied*, 440 U.S. 976 (1979), the Court's decision in *Crist v. Bretz*, 437 U.S. 28 (1978), was held retroactive. In *Holt v. Black*, 550 F.2d 1061 (6th Cir.), *cert. denied*, 432 U.S. 910 (1977), the court held *Breed v. Jones*, 421 U.S. 519 (1975), retroactive, whereas a contrary conclusion was reached in *Jackson v. Justices of the Superior Court of Mass.*, 549 F.2d 215 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977). In *United States v. Rumpf*, 576 F.2d 818 (10th Cir. 1976), *cert. denied*, 439 U.S. 893 (1978), the decision in *Abney v. United States*, 431 U.S. 651 (1977), was held to be prospective only. Finally, in *Blackburn v. Cross*, 510 F.2d 1014 (5th Cir. 1975), the court afforded full retroactive status to the collateral estoppel doctrine of *Ashe v. Swenson*, 397 U.S. 436 (1970).

Two courts have held *Burks* and *Greene* retroactive. The Ninth Circuit did so with no analysis whatsoever in *United States v. Bodey*, 607 F.2d 275 (9th Cir. 1979). And a divided Texas Court of Criminal Appeals so held in *Ex parte Reynolds*, 588 S.W.2d 900 (Tex.Crim.App. 1979), *cert. denied*, 445 U.S. 920 (1980).

extent of the unfairness of such prejudice, compared to the beneficial effect on the valid interests of defendants in such retroactive application.

Applying this test to the facts before it, the Court held *Waller v. Florida* retroactive, stating first that "[the] decision in *Waller* cannot be said to have marked a departure from the past decisions of this Court." *Robinson v. Neil* at 510. The Court in effect held that the State should have realized that municipalities and states were sufficiently parts of one sovereign that criminal prosecution by one would bar later criminal prosecution by the other—the essential holding of *Waller v. Florida.*

By contrast, the decisions of the Court in *Burks v. United States* and *Greene v. Massey* marked a significant departure from prior decisions. The Court itself acknowledged, "The Court's holdings in this area, beginning with *Bryan* [*v. United States,* 338 U.S. 552 (1950)], can hardly be characterized as models of consistency and clarity." *Burks v. United States,* 437 U.S. at 6. The Court further admitted, "to reach a different result [from the Court of Appeals] will require a departure from the [earlier] holdings." *Id.* To settle the matter the Court stated:

> [O]ur past holdings to not appear consistent with what we believe that the Double Jeopardy Clause commands. A close reexamination of these precedents, however, persuades us that they have not properly construed the Clause, and accordingly, should no longer be followed.

Id. at 12. Obviously, the law in this area before *Burks* and *Greene*—expecially insofar as whether seeking an appeal constitutes a waiver of the criminal defendant's double jeopardy rights—was on balance contrary to the newly announced constitutional rule.

Texas law for decades has mirrored federal law in this respect. In a long and unbroken line of cases implementing Tex. Code Crim. Proc. Ann. art. 44.25, and its statutory predecessors, the Texas Court of Criminal Appeals has held that a defendant might be retried for the same offense following a reversal for insufficient evidence.[4] Thus, under *Robinson v. Neil*, good faith reliance by Texas law enforcement authorities is shown.

Clearly, good faith detrimental reliance—*i.e.*, prejudice—could well have been a reality in many cases such as Bullard's, and in two ways. First, for example, if Bullard or others similarly situated, might have been tried upon other charges following their first convictions, but the State in good faith believed that they might also validly be retried upon the same charge for which a reversal of the conviction had been obtained, then prejudice or detrimental reliance would be shown. Applying this concept to the punishment stage of trial, the prosecution might have had other cases to pursue against Bullard in order to increase his punishment. But the prosecution could not reasonably foresee the constitutional difficulty with Bullard's life sentence and, through no fault of the State, Bullard cannot now be retried for any of such charges, the applicable statutes of limitations having long ago expired.

Significantly, the record reflects that possibility has become reality in Bullard's particular case. The affidavit of W.T. Westmoreland, Chief, Appellate Section, Dallas District Attorney's Office (ROA 86), states that in his office, as well as in many others in Texas, there are frequently multiple charges or indictments pending

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4. After *Burks* and *Greene* the Court of Criminal Appeals held Article 44.25 unconstitutional to the extent of conflict with decisions of the United States Supreme Court. *Johnson v. State*, 571 S.W.2d 4, 6 n. 2 (Tex.Crim.App. 1978).

against particular criminal defendants. Further, "It is a common practice in this office and others to dismiss those other charges if one is prosecuted successfully." *Id.*

The affidavit and supporting documents further attest as follows:

> In this case, our records show that there were three felony indictments against Bullard in Dallas County in 1975. In addition to the indictment for theft resulting in a life-sentence, there were pending indictments for burglary of a habitation and burglary of a vehicle, both felonies. These indictments were dismissed after the theft case was prosecuted to an apparently successful conclusion.

Id.

Second, there are many reasons why there might have been additional evidence that could have been introduced at Bullard's trial—even at the punishment phase—but that was excluded for a variety of reasons. *See, footnote one, supra.* Or Bullard might have been re-indicted and retried as a habitual offender with *different* prior convictions alleged for enhancement. The State should not be deprived of this evidence or proof because of a strategic judgment founded upon a good faith, but erroneous, view of the law.

The Court of Appeals erroneously rejected this analysis. The court admitted that the proper analysis is far from clear:

> "[T]he Court [in *Robinson v. Neil*] did not expound to any great length on whether rulings implicating the double jeopardy clause should always be retroactive and if not under what circumstances they should be retroactive."

Bullard v. Estelle, 665 F.2d at 1364. The court then proceeded to fashion in effect a per se rule of retroactivity by finding detrimental reliance by the State irrelevant and, alternatively, nonexistent in this case. *Robinson v. Neil*, however, plainly leaves the way open to consider prejudice to the State, provided that such reliance was in good faith. The Court of Appeals cited a Texas case, *Elizalde v. State*, 507 S.W.2d 749 (Tex.Crim.App. 1974), for the proposition that the Texas courts had previously embraced the principle of *Burks* and *Greene*. *Elizalde* held, however, only that where *illegally admitted evidence* was admitted at punishment, that evidence could not be re-introduced at the second punishment hearing.

The Court of Appeals' holding that Petitioner failed to show prejudice is equally unpersuasive. The court in effect held that the State should not be heard to complain of prejudice where it had already had one opportunity to muster its proof. There was almost no discussion of Petitioner's precise claims of prejudice.

This Court plainly stated in *Brown v. Louisiana*, 447 U.S. 323, 327 (1979):

> "[I]t is clear that resolution of the question of retroactivity does not automatically turn on the particular provision of the Constitution on which the new prescription is based."

Yet the holding of the Court of Appeals in this case tends toward that precise result.

It should be empasized that Respondent Bullard does not present a case in which doubt has been cast upon the factual accuracy of either the guilty verdict in his first trial or the punishment verdict in his second hearing. In *Ivan V. v. City of New York*, 407 U.S. 203 (1972) [quoted and emphasis added in *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977)], the Court stated as follows:

> Where the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs the truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule has been given a complete retroactive effect. Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has suffered to require prospective application in these circumstances. [citations omitted].

The major purpose of double jeopardy doctrine is not to protect the integrity of the fact-finding process: instead, it is to preclude the State from harassment of an individual by repeated attempts to incarcerate him. *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969); *Green v. United States*, 355 U.S. 184, 187-88 (1957). Indeed, it is fundamental to principles of double jeopardy that it is preferable that a guilty man go free than be subjected to a forbidden second prosecution.

For these reasons, a question as to the accuracy of the guilty verdict based upon legally insufficient evidence is a sound basis for ordering an acquittal upon direct appeal from such a verdict. Perhaps it is even a sound basis for applying *Burks* and *Greene* to the punishment stage of a criminal trial. In Bullard's case, however, any such question has been obviated by his subsequent resentencing hearing and the presentation of virtually the same evidence but in a procedurally correct manner. In any event, there is no longer any question whatsoever as to the correct factual basis of his life sentence, whether such a question is raised in terms of the "insufficiency" of the evidence or the correction of trial-type error.

Simply stated, it is no longer possible to prevent Bullard's second sentencing hearing—and it never was.

Following the Court of Criminal Appeals' initial reversal, Bullard stood validly convicted, but without a valid punishment. Accordingly, a second punishment hearing *had* to be held to determine Bullard's proper punishment, regardless of the range from which it might be selected. To hold *Burks* and *Greene* retroactive would mean that Bullard and others similarly situated must undergo yet a third punishment hearing.

To the extent that principles relating to double jeopardy are designed to spare a criminal defendant from the hardship, financial and emotional, of multiple proceedings—ordinarily, multiple prosecutions—that purpose simply is not served in this case. The sole benefit sought by Bullard is to reduce punishment. That result is not one ordinarily considered to ba a valid goal of the double jeopardy clause.

For these reasons, *Burks*, *Greene*, and *Bullington* should be held prospective only in their application.

II.

THIS COURT SHOULD REVIEW THIS IMPORTANT ISSUE

Petitioner cannot know precisely the numbers of convictions and punishments that may eventually be invalidated by the holding of the Court of Appeals in this case or similar hodings elsewhere, but each such result is significant. Further, Petitioner submits that both the federal and state judiciary have experienced great difficulty in interpreting and applying *Robinson v. Neil*, 409 U.S. 505 (1973). This case presents an ideal opportunity for the Court to illustrate the proper application of retroactivity principles in a double jeopardy context.

CONCLUSION

For these reasons, Petitioner respectfully prays that the petition for writ of certiorari be granted, and the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Charles Edwin Bullard	§	
	§	
V.	§	**CA-3-78-0442-G**
	§	
W.J. Estelle, Director, TDC	§	
	§	

J U D G M E N T

The application for a writ of habeas corpus is GRANTED. Petitioner will be released from custody unless retried or resentenced, as the state law requires, within 90 days.

/s/ Patrick E. Higginbotham

Patrick E. Higginbotham
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Charles Edwin Bullard	§	
	§	
V.	§	**CA-3-78-0442-G**
	§	
W.J. Estelle, Director, TDC	§	
	§	

MEMORANDUM ORDER

In this habeas corpus petition under 28 U.S.C. § 2254, petitioner seeks relief from a conviction for felony theft, enhanced by two prior felony convictions, and resultant life sentence. Petitioner was convicted by a jury, but elected to have the court pass sentence. His conviction was affirmed on appeal, but the life sentence assessed against him was vacated due to insufficiency of the evidence to show that petitioner was the defendant who was convicted in one of the two prior convictions introduced in the punishment phase of his trial. *Bullard v. State,* 533 S.W.2d 812 (Tex. Crim. App. 1976). The case was remanded to the trial court, which received additional evidence and again imposed a life sentence.[1] The Court of Criminal Appeals affirmed. *Bullard v. State,* 548 S.W.2d 13 (Tex. Crim. App. 1977).

Petitioner asserts six grounds for relief:

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1. Ironically, had the petitioner elected a jury for the sentencing phase, Texas law would have required retrial on issues of guilt *and* punishment. *E.g., Bullard v. State,* 548 S.W.2d 13, 18 (Tex. Crim. App. 1977); *Ellison v. State,* 432 S.W.2d 955 (Tex. Crim. App. 1968).

1. His constitutional rights were violated when the prosecutor sought and obtained a reindictment on the charge of enhanced felony theft upon petitioner's refusal to plead guilty to a prior indictment alleging felony theft alone.

2. His constitutional rights were violated by the prosecutor's comment in oral argument on petitioner's failure to testify.

3. The evidence adduced during the guilt-innocence phase of his trial was insufficient to sustain the verdict of guilty.

4. The trial court erred in denying him a jury during the punishment phase of his trial after remand by the Texas Court of Criminal Appeals.

5. His fifth amendment right not to be placed twice in jeopardy for the same charge was violated in permitting the prosecution to present evidence at petitioner's sentencing proceeding after remand by the Texas Court of Criminal Appeals.

6. The imposition of a life sentence in his case constituted cruel and unusual punishment in violation of the eighth amendment.

The respondent, the magistrate, and the court agree that state remedies have been exhausted.

I. Grounds One Through Four

The court agrees with the magistrate that petitioner's first ground for relief is squarely foreclosed by *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). *Accord, Montgomery v. Estelle*, 568 F.2d 457 (5th Cir.), *cert. denied*, 439 U.S. 842 (1978), on all fours with the present case.

Nothing in the prosecuter's closing argument may reasonably be construed as a comment on petitioner's failure to testify. The gist of the prosecutor's challenged argument was that the defendant's intent could be in-

ferred from his acts, an entirely proper form of argument. The prosecutor did refer to "acts done, words spoken" as measures of intent, and then state that "[n]o one has any words of Charles Bullard." Taken in context, however, this remark refers to the facts that none of the prosecution witnesses had testified to words spoken by petitioner, and not to petitioner's failure to testify. In any event, the error appears harmless.

The evidense is sufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979). The evidence, summarized in *Bullard v. State, supra*, 533 S.W.2d at 814-15, showed that petitioner brought a TV set and stereo to a food store and left without those items. Police undercover agents observed the items, later identified as stolen, in the store, and testified that they were the only such items in the store. The items were recovered from a suspect who had taken them from the store. The owner positively identified the items, and testified that he had paid about $700 for them. This evidence, together with reasonable inferences which may be drawn therefrom, is sufficient to permit a reasonable jury to find petitioner guilty beyond a reasonable doubt of felony theft over $200. *See Jackson v. Virginia, supra.*

There is no independent Federal constitutional right to have a jury fix punishment. *James v. Twomey*, 466 F.2d 718, 720-21 (7th Cir. 1972); *Payne v. Nash*, 327 F.2d 197, 200 (8th Cir. 1964); *cf. Parrish v. Beto*, 414 F.2d 770 (5th Cir. 1969), *cert. denied*, 396 U.S. 1026 (1970) (guilty plea). Denial of a state-created right to assessment of punishment by a jury may, however, constitute a denial of due process. *Hicks v. Oklahoma*, 48 U.S.L.W. 4724 (1980). In the *Hicks* case, a mandatory sentence under an invalid statute was upheld by a state court, notwithstanding a state statute providing for jury assessment of punishment, on the ground that the invalid mandatory sentence was within the range the jury could properly have assessed. The Supreme Court vacated

and remanded, holding that arbitrary disregard of the state-created right was a denial of due process.

In contrast to *Hicks,* where a state court acknowledged a state right to jury trial on punishment, applicable in the defendant's case, but declined to afford such a right because it was deemed unnecessary, the Texas Court of Criminal Appeals expressly held that Texas did not afford a right to jury trial on punishment in petitioner's case. *Bullard v. State, supra,* 548 S.W.2d at 16-21. *See Ex Parte Marshall,* 72 Tex. Crim. 83, 161 S.W. 112 (1913) (no Texas constitutional right). That court's opinion in *Bullard* was based on a principled consideration of the legal arguments favoring and opposing a right to jury under the facts of petitioner's case, and cannot be characterized as an arbitrary disregard of otherwise applicable state law. This being the case, no claim is stated by the fourth ground for relief.

Petitioner's fifth ground presents the most substantial and difficult questions. He argues that the presentation of new evidence at his punishment hearing following reversal of his earlier sentence violated the double jeopardy clause as interpreted in *Burks v. United States,* 437 U.S. 1 (1978), and *Greene v. Massey,* 437 U.S. 19 (1978). Two questions are presented: First, are the decisions in *Burks and Greene* to be applied retroactively?[2] Second, do those decisions prohibit a new punishment phase trial resulting in a life sentence where the punishment phase of an earlier trial has been reversed for insufficientcy of the evidence to support a life sentence? A negative answer to either question will require dismissal of petitioner's fifth ground.

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2. Petitioner's conviction and resentencing became final before the *Burks* and *Greene* decisions were handed down.

II. Retroactivity of Burks and Greene

The general approach to retroactivity of decisions expanding the scope of constitutional protections in a criminal context has since 1965 been that set forth in *Linkletter v. Walker,* 381 U.S. 618 (1965), and elaborated upon in *Stovall v. Denno,* 388 U.S. 293 (1967), and *Desist v. United States,* 394 U.S. 248 (1969). Under this test, retroactivity depends on the balancing of three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Desist v. United States, supra,* at 249.

While it is the general rule that "the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based," *Brown v. Louisiana,* 48 U.S.L.W. 4719 (1980); *Johnson v. New Jersey,* 384 U.S. 719 (1966), the Supreme Court made it clear in *Robinson v. Neil,* 409 U.S. 505 (1973), that some double jeopardy cases are *sui generis* so far as retroactivity is concerned. Eschewing the *Linkletter* analysis, the Court unanimously held that

> [t]he guarantee against double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial. A number of the constitutional rules applied prospectively only under the *Linkletter* cases were found not to affect the basic fairness of the earlier trial, but to have been directed instead to collateral purposes such as the deterrence of

> unlawful police conduct, *Mapp v. Ohio,* [367 U.S. 643 (1961)].

409 U.S. at 509. The Court went on to hold retroactive the rule in *Waller v. Florida,* 397 U.S. 387 (1970), that prosecution for the same offense may not be had both in municipal and in state court. The Court failed, however, to articulate a standard governing retroactivity of double jeopardy decisions generally. Of the three *Linkletter/Desist* tests, the Court discussed only that of prejudice to the state due to reliance on prior law: "We would not suggest that the distinction that we draw is an ironclad one that will invariably result in the easy classification of cases in one category or the other. The element of reliance embodied in the *Linkletter* analysis will not be wholly absent in the case of constitutional decisions not related to trial procedure..." 409 U.S. at 509.

Recent cases in the circuits have construed *Robinson* as establishing a virtual *per se* rule of retroactivity in double jeopardy cases involving the prohibition of a second trial rather that procedural restrictions stopping short of a total bar to retrial. Hence in *Mizell v. Attorney General,* 586 F.2d 942 (2d Cir. 1978), *cert. denied,* 440 U.S. 967 (1979), the Second Circuit held on the strength of *Robinson* that *Crist v. Bretz,* 437 U.S. 28 (1978) (rule that jeopardy attaches when jury is sworn of constitutional dimension), was to be applied retroactively. The court rejected the *Linkletter* approach, quoted extensively from *Robinson,* and held in summary fashion that *Crist* was retroactive. Likewise, in *Holt v. Black,* 550 F.2d 1061 (6th Cir. 1977), *cert. denied,* 432 U.S. 910 (1977), the Sixth Circuit held *Robinson* to be dispositive of the question of the retroactivity of *Breed v. Jones,* 421 U.S. 519 (1975) (juvenile delinquency hearing bars later adult trial), again quoting extensively from *Robinson* but engaging in little analysis. *But see Jackson v. Justices of the Superior Court,* 549 F.2d 215

(1st Cir.), *cert. denied,* 430 U.S. 975 (1977) (contra; rejecting *Robinson* approach in favor of standard analysis).

On the other hand, procedural requirements of the clause, *i.e.,* requirements not directly barring retrial, have been analyzed under the standard *Linkletter/Desist* tests. In *United States, v. Rumpf,* 576 F.2D 818 (10th Cir.), *cert. denied,* 439 U.S. 893 (1978), the Tenth Circuit held the rule of *Abney v. United States,* 431 U.S. 651 (1977) (pretrial appeal for denial of double jeopardy dismissal), to be nonretroactive. *Robinson* was not discussed. Similarly, in *Blackburn v. Cross,* 510 F.2d 1014 (5th Cir. 1975), the Fifth Circuit applied a *Linkletter* approach to the retroactivity of *Ashe v. Swenson,* 397 U.S. 436 (1970) (collateral estoppel in criminal cases), finding that decision retroactive. The court noted that *Robinson* lent support to its decision, but expressly declined to rest its decision on that case. 510 F.2d at 1017-18 n.2.

Two courts have passed on the retroactivity of *Burks* and *Greene.* In *United States v. Bodey,* 607 F.2d 265 (9th Cir. 1979), the Ninth Circuit, quoting from *Robinson,* held the *Burks/Greene* rule retroactive in summary fashion. The Texas Court of Criminal Appeals has dealt with the issue at greater length. That court has repeatedly held *Burks* and *Greene* retroactive. *Ex Parte Harris,* No. 60321 (Tex. Crim. App. nov. 7, 1979); *Ex Parte Colunga,* 587 S.W.2d 426 (Tex.Crim.App. Nov. 7, 1979); *Ex Parte Dixon,* 583 S.W.2d 793 (Tex.Crim.App. 1979). *cert. denied,* 48 U.S.L.W. 3569 (1980); *Ex Parte Reynolds,* 588 S.W.2d 900 (Tex.Crim.App. 1979), *cert. denied,* 48 U.S.L.W. 3569 (1980); *Ex Parte Mixon,* 583 S.W.2d 378 (Tex.Crim.App. 1979), *cert. denied,* 48 U.S.L.W. 3569 (1980). In *Ex Parte Reynolds, supra,* the progenitor of this line of cases, the court interpreted *Robinson* as diminishing the importance of the "reliance" prong of the tripartite test of *Stovall* and *Desist,* and virtually eliminating the third branch of the test (effect on administration of justice). It thus focused

on the first branch, relating to the purpose of the rule. Finding a purpose to avoid the inequity of allowing the government a "second bite at the apple," *Burks, supra,* at 17, and to equate the treatment afforded defendants whose convictions are reversed on appeal for insufficient evidence with that given to those who are acquitted by the jury and those whose acquittal is directed by the trial judge, the court held that the purpose of *Burks* and Greene favored retroactivity. 588 S.W.2d at 903. It canvassed possible grounds of reliance by the state on the prior rule, and found such grounds speculative at best. 588 S.W.2d at 904. Judge Douglas and Davis dissented, rejecting the notion that *Robinson* established a *per se* rule. They found a purpose in *Burks* and *Greene* to prevent a second *trial,* and favored nonretroactivity since the second trial had already taken place.

Whether the traditional test of *Linkletter, Stovall,* and *Desist* or the more recent but more amorphous test of *Robinson* is applied, a conclusion that *Burks* and *Greene* are retroactive is strongly indicated. The purpose of the rule of those two cases is to prevent the arbitrariness which would otherwise result from differing treatment of defendants whose insufficiency of evidence claims are recognized in different procedural postures. *Burks, supra,* at 10-11; *see* Note, *Double Jeopardy Consequences of Mistrial, Dismissal and Reversal of Conviction on Appeal,* 16 Am. Crim. L. Rev. 235, 268-69, 271 (1979). *See generally Sapir v. United States,* 348 U.S. 373, 374 (1955) (Douglas, J., concurring); D. Mayers & F. Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions,* 74 Harv. L. Rev. 1, 13-14 (1960); Comment, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence,* 31 U. Chi. L. Rev. 365 (1964). While the primary thrust of the double jeopardy clause is to prevent a second trial, *Abney v. United States, supra,* at 661, it does not follow that once a second trial has taken place all double jeopardy concerns disappear. "The constitutional prohibition against 'double jeopardy' was designed to protect an individual

from being subjected to the hazards of trial *and possible conviction* more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957) (emphasis supplied). If the *risk* of conviction created by the second trial is unacceptable under the double jeopardy clause, *a fortiori* the fruition of that risk must be unacceptable. While a second trial involves many incidents detrimental to the accused, such as personal strain, public embarrasssment, and expense, *Abney, supra*, at 661, which once suffered cannot be retroactively remedied, not the least of those incidents is the punishment imposed at the second trial. To refuse to provide relief against the result of a second trial merely because the trial itself cannot be erased would be to turn the double jeopardy clause on its head.

Retroactivity of *Burks* and *Greene* can run afoul of little detrimental reliance on the part of the state. As stated in *Burks, supra*, at 16, "the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." The Texas Court of Criminal Appeals correctly noted that the only possible source of prejudice, that the state might have foregone prosecution for other offenses in order to reprosecute on the original offense, is too speculative in nature to bar retroactivity. *Ex Parte Reynolds, supra*, at 904.

The third branch of the *Linkletter* test, while arguably not applicable under *Robinson*, is nonetheless satisfied. In evaluating "the effect [of retroactivity] on the administration of justice," *Desist, supra*, at 249, we must be mindful of the Supreme Court's admonition that "where the Double Jeopardy Clause is applicable, its sweep is absolute." *Burks, supra*, at 11 n. 6. Unlike retroactivity of procedural guarantees such as the exclusionary rule, *see Linkletter, supra*, retroactivity of the *Burks/Greene* aspect of the guarantee against double jeopardy will not interfere with the results of

trials fair in other respects, thereby resulting in a burden on our system of justice and a windfall to those lucky enough to escape reprosecution. *Burks* and *Greene* instead teach that second trials should not have been held at all, and that another reprosecution would be barred. Retroactivity of those decisions thus serves rather than disserves the ends of justice.

In sum, under either of the potentially applicable standards, retroactivity of *Burks* and *Greene* is warranted. This being so, the question then becomes one of whether those decisions are applicable to petitioner's case.

III. Applicability of Burks and Greene to Recidivist Proceedings

The rule of *Burks* and *Greene, supra,* was decided in the context of an insufficiency of evidence to support one or more elements necessary under the substantive state or federal law to establish a defendant's guilt.[3]

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3. The Court in *Greene* pretermitted the question of whether the *Burks* doctrine bars reprosecution where erroneously admitted evidence, such as the fruits of an illegal search and seizure, is necessary to make up a minimally sufficient quantum of evidence for conviction. *Greene v. Massey, supra,* at 26 n.9. The Texas Court of Ciminal Appeals has ruled that *Burks* does not apply in such a situation. *Ex Parte Duran,* 581 S.W.2d 683 (Tex. Crim. App. 1979). The second conviction in this case could arguable be construed as "erroneously admitted evidence," since without a proper connection between the conviction and petitioner, the evidence was irrelevant. The fundamental difference between this case and *Duran,* however, is that in this case, all the admitted evidence, proper and improper, remains insufficient to support conviction, while in *Duran* the evidence adduced at trial would, if admissible, have been sufficient. This case is thus a "pure" case of insufficient evidence, as in *Burks,* with no overlay of "trial error" as in *Duran.* The court expresses no opinion on the question reserved in *Greene* and decided in *Duran.*

Ordinarily, punishment proceedings, while sometimes involving evidentiary proof for purposes of aggravation or mitigation, do not involve the proof of discrete elements as a prerequisite to a particular punishment or range of punishment. The degree of punishment is instead left to the discretion of the sentencing entity. Hence *Burks* and *Greene* are as a rule inapplicable to punishment proceedings, since such proceedings cannot ordinarily be reversed for "insufficiency of the evidence" to support a particular level of punishment.

An exception to the rule of virtually unreviewable discretion of sentencing authorities lies in the area of recidivist or "habitual criminal" statutes. Under the Texas statute, typical of that of many states, a convicted defendant who is shown to have previously been convicted of two felonies, occurring in a specified sequence, receives a mandatory life sentence. Tex. Penal Code § 12.42(d); *cf.* Tex. Penal Code § 12.43 (habitual misdemeanor offenders). Under this scheme, proof of an objective fact -- conviction of two prior felonies under certain conditions -- authorizes, and indeed requires, an enhanced punishment, often greatly in excess of that which could be imposed for the offense itself.[4] *See generally Rummel v. Estelle,* 48 U.S.L.W. 4261 (1980).

The question then becomes whether *Burks* and *Greene* prevent a renewed life sentence under this statute where an original life sentence has been reversed on appeal for insufficiency of the evidence to support enhancement. The only two courts to have addressed this issue have held that the cases do not apply to such a situation. *Girnus v. State,* 595 S.W.2d 118 (Tex. Crim. App.

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4. Compare the revised Texas death penalty procedure, Tex. Code Crim. Proc. art. 37.071; *cf.* Model Penal Code § 921.141 (Supp. 1976-77). *See generally, e.g., Jurek v. Texas,* 428 U.S. 262 (1976).

1980); *Porier v. State, 591 S.W.2d 482 (Tex. Crim. App. 1979) (en banc); State ex rel. McMannis v. Mohn,* 254 S.E.2d 805 (W.V. 1979). Both courts employed similar reasoning, holding that the respective recidivist statutes do not create a separate offense, and hence that retrial of the question of recidivism does not offend the double jeopardy clause. The *en banc* decision of the Texas Court of Criminal Appeals was by a 5-4 vote; the dissenting opinion regarded *Burks* and *Greene* as fully applicable to retrial of enhancement issues. *Porier v. State, supra,* at 484-85 (Odom, J., concurring in part and dissenting in part).

Recent case law has deemphasized the concept of an "offense" for double jeopardy purposes. *See Whalen v. United States,* 48 U.S.L.W. 4406 (1980); *United States v. Rodriquez,* 612 F.2d 906, 924 (5th Cir. 1980). These decisions recognize that the definition of an "offense" is essentially arbitrary -- that a single act or course of conduct may with equal logic be designated one offense or several. For example, the Texas recidivist statute as it applies to a conviction for felony theft could be recast as establishing two offenses. Offense #1 would consist of felony theft by an individual with two prior felony convictions, and would be punishable by a mandatory life sentence. Offense #2, a lesser included offense of Offense #1, would consist of felony theft by a person with fewer than two prior felony convictions,[5] and would be punishable as an ordinary felony under Tex. Penal Code §§ 12.32 through 12.34. Indeed, this approach is sometimes utilized in the Texas penal statutes. *See* Tex. Penal Code § 31.03(d)(4)(C) (theft, otherwise a misdemeanor, is a felony if defendant has twice been convicted of theft). To allow the double jeopardy conse-

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5. Tex. Penal Code § 12.42 also provides for partial enhancement based on one prior felony conviction. This aspect is ignored in the example given for the sake of simplicity.

quences of retrial to turn on whether recidivism is a separate or different offense under state law is thus to exalt form over substance.[6]

The Court's holding in *Burks* established the principle that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States, supra,* at 11. If this principle is to be given its full meaning, it must be applied in every situation in which the burden is on the prosecution to establish a fact as a prerequisite to a given degree of punishment. While retrial of enhancement issues would not give the prosecution a second opportunity to establish criminal *liability,* it would give the state a forbidden "second bite at the apple" on the *range* of punishment which could legally be imposed. *Cf. Burks v. United States, supra,* at 17.

A second important rationale of *Burks* deals with procedural equality. The Court reasoned that it would be illogical to afford a different degree of double jeopardy protection to reversal on appeal for insufficient evidence, which indicates that the factfinder erred in failing to acquit the defendant, and acquittal in the trial court, which has been invariably held to bar reprosecution. In similar fashion, reversal of a sentence for insufficient evidence to support the enhancement allegations is an indication that the jury or trial judge erred in fail-

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6. Similarly, some states define the offense of capital murder as first-degree murder accompanied by certain aggravating circumstances. Other states define only an offense of first-degree murder, and authorize an enhanced punishment if aggravating circumstances are present. A jury's finding that aggravating circumstances are absent ought not to have differing double jeopardy consequences depending on the state's particular formulation of the offense.

ing to find those allegations "untrue." To draw a distinction between those two procedural postures would create the same inconsistency the *Burks* court sought to avoid. *See Porier v. State. supra,* 591 S.W.2D at 485 (Odom, J., concurring in part and dissenting in part).

The law is now well established that conviction of a lesser included offense constitutes an implied acquittal of the greater offense, and bars retrial on the greater charge. *Price v. Georgia,* 398 U.S. 323, 329 (1970); *Green v. United States,* 355 U.S. 184, 190 (1957). For example, a conviction for second degree murder bars retrial for first degree murder. *Green v. United States, supra; cf. Palko v. Connecticut,* 302 U.S. 319 (1937). The *Price* and *Green* cases teach that an accused may be forced to run the gauntlet of exposure to a particular quantum of punishment only once. *But cf. North Carolina v. Pearce,* 395 U.S. 711 (1969) (increased sentence on retrial not double jeopardy violation). Given the analogy between recidivist statutes and statutes defining greater and lesser included offenses, it follows that a finding of "untrue" to one or both enhancement allegations would preclude retrial of the enhancement issues, just as an implied finding of "untrue" to an allegation of premeditation forecloses retrial for first degree murder. This being the case, a similar effect must be given to an appellate decision that a finding of "untrue" was warranted by the evidence.[7]

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7. The citation by the Supreme Court of a case [*Regina v. Drury,* 3 Cox Crim. Cas. 544, 175 Eng. Rep. 516 (Q.B. 1849)] involving and "improper sentence" as one involving reversal for "trial error," *Burks v. United States, supra,* at 14 n.8, in which case retrial is not barred, does not require a different result. There is no indication that the early English case cited involved a specialized sentence requiring particular proof, as is the case here.

IV. Relief

For the foregoing reasons, petitioner's fifth ground of error is well taken. Since there is no error in the underlying conviction, however, a general writ of habeas corpus is not in order. Rather, petitioner will be ordered discharged from custody unless retried or resentenced, as the state law requires, within 90 days.[8] *See Brown v. Estelle*, 591 F.2d 1207 (5th Cir. 1979). Sentence on retrial or resentencing may not, of course, be based on Tex. Penal Code § 12.42(d). Whether petitioner may be sentenced under Tex. Penal Code § 12.42(a) (enhancement based on one prior felony conviction), in light of the fact that the trial court's finding as to one of the prior convictions was supported by sufficient evidence, is, at least in the first instance, for the state courts to decide.

/s/ Patrick E. Higginbotham

Patrick E. Higginbotham
United States District Judge

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8. Petitioner's sixth ground of error, that his life sentence constitues cruel and unusual punishment, is moot under this disposition. In any event, it is foreclosed by *Rummel v. Estelle*, 48 U.S.L.W. 4261 (1980).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Charles Edwin Bullard	§	
	§	
V.	§	**CA-3-78-0442-G**
	§	
W.J. Estelle, Jr.	§	

MEMORANDUM ORDER

In this habeas corpus action, the court on August 27, 1980, entered a memorandum order and judgment granting a writ of habeas corpus. On September 12, 1980, respondent filed a motion for new trial, arguing that the court erred in holding the rule of *Burks v. United States*, 437 U.S. 1 (1978), and *Greene v. Massey*, 437 U.S. 19 (1978), to be retroactive.

At the outset, the timeliness of the motion is subject to question. Fed. R. Civ. P. 59(b) provides that "[a] motion for a new trial shall be served not later than 10 days after the entry of the judgment." The instant motion was filed sixteen days after entry of judgment. The critical time, however, is that of service and not that of filing. *Allen v. Ault*, 564 F.2d 1198, 1199 (5th Cir. 1977); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2812, at 83 (1973). The certificate of service accompanying the motion, *see* Local Rule 2.1(e)(4), states that service was accomplished on September 8, 1980, the 12th day after judgment. The tenth day having fallen on Saturday, September 6, the service on Mon-

day, September 8, was timely. Fed. R. Civ. P. 6(a). Filing with the court, having occurred within a reasonable time (four days) after service, was also timely. Fed.R.Civ.P. 5(d).

Respondent argues that this court failed to accord sufficient weight to the possibility of detrimental reliance by the State on the pre-*Burks* rule.[1] He urges as "a matter of common sense and general knowledge" that prosecutors often forego prosecution on other offenses once an apparently valid conviction is obtained. In addition, he offers the affidavit of the Chief of the Appellate Section of the Dallas District Attorney's Office in support of this assertion. This affidavit, in addition to speaking generally concerning foregone prosecutions, points to two indictments against this petitioner which were dismissed after the instant indictment was prosecuted to an apparently successful conclusion.

Respondent's arguments overemphasize the importance of the reliance element of the test of *Linkletter v. Walker*, 381 U.S. 618 (1965), and its progeny, as applied to double jeopardy decisions. Reliance is only one element of a three-part test, which also focuses on the purpose of a new rule and its effect on the administration of justice. The Texas Court of Criminal Appeals held in *Ex Parte Reynolds*, 588 S.W.2d 900, 903 (Tex. Crim. App. 1979), *cert. denied*, 48 U.S.L.W. 3569 (1980), that the purpose of the *Burks/Greene* rule was of primary importance in determining its retroactivity, and this court agrees. *See Desist v. United States*, 394 U.S. 244, 249 (1969)("Foremost among these [*Linkletter*] factors is the purpose to be served by the new constitutional rule.")

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1. No challenge is made in the motion for new trial to any other aspect of this court's retroactivity analysis. Nor is any other error claimed in the court's application of *Burks* and *Greene* to recidivist proceedings.

It must be made clear that dismissal of other charges following an apparently successful *original conviction* is not the type of reliance at issue here. An argument based on this type of reliance would have to be that other prosecutions were foregone in the belief that *if* the original conviction were reversed for insufficient evidence a retrial would be available. This argument is implausible for two reasons: First, the likelihood that any particular conviction will be reversed for insufficient evidence is remote, especially when viewed from the prosecutor's perspective immediately following a conviction.[2] This suggests that few prosecutors would take such a possibility into account in determining whether to prosecute on other charges. Second, if a prosecutor were indeed worried about this possibility, the pre-*Burks* rule would have provided cold comfort: a prosecutor would be unlikely to forego prosecution on other ripe offenses in reliance on an opportunity to reprosecute a stale case a year or two later after an appellate reversal. These factors suggest that few prosecutors relied on the pre-*Burks* rule by failing to prosecute other offenses as safeguards against a later insufficient evidence reversal.

The only arguable detrimental reliance on the pre-*Burks* rule would occur *after* the original conviction has been reversed for evidentiary insufficiency. At this point, it is possible that a prosecutor will choose to retry the old case rather than trying other cases for the first time. By this time, however, the choice is among several stale cases.[3] As to some of these, the statute of limita-

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2. It is much more likely that a case will be reversed for trial error, in which event there is no bar to retrial. *Green v. Massey*, *supra*, at 26.

3. It is unlikely that fresh charges will be available in light of the fact that defendants are typically incarcerated pending appeal.

tions may have run. As to the remainder, there was little reason under the pre-*Burks* rule for a prosecutor to choose as the sole charge for prosecution a charge which the appellate court has already held to have been unsupported by sufficient evidence at the original trial. This is not to say that prosecutors will not choose other charges to prosecute now that *Burks* and *Greene* are the law: it merely suggests that such procedure will not be a radical departure from their previous practice.

In holding *Burks* and *Greene* retroactive, the Texas Court of Criminal Appeals had this to say concerning the state's allegations of detrimental reliance:

> [W]hat prejudice would the State suffer from retrospective application of the new rule as a result of its reliance on the old rule? The prejudice in retroactive application of procedural rules arises primarily from the denial of use of evidence and the burden of retrial. No such prejudice would accompany a retroactive application of the *Burks/Greene* rule simply because it would bar rather that require a retrial, and it in no way affects what evidence the State may use. The State in its brief suggests prejudice "if petitioner might have been tried upon other charges following [her] first conviction," but the State abandoned any such other prosecutions to reprosecute the reversed case. We find such prejudice to be too speculative in nature. If this were sufficient to bar retroactive application, then all rules would be prospective only. Also, as stated in *Burks* itself:
>
> > "[T]he prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble."

> In sum, we find no demonstrable prejudice to the State despite good faith reliance on the old rule.

Ex Parte Reynolds, supra, at 904. This court endorsed this reasoning in its August 27, 1980, memorandum order. While the court's memorandum order was in preparation, a sister district court also endorsed the *Reynolds* analysis. *Carter v. Estelle,* No. H-80-433 (S.D. Tex. July 17, 1980). Thus all courts to consider the question have held the possibility of foregone reprosecution insufficient to bar retroactivity.

The fact that prosecution on other charges was in fact foregone in this case does not alter the result. While a rule under which retroactivity is evaluated on a case-by-case basis is conceivable, such a rule would be without precedential support. Under the *Linkletter* and *Robinson*[4] tests, retroactivity is determined without reference to the facts of any particular case.

The motion for new trial is DENIED.

Patrick E. Higginbotham
United States District Judge

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4. *Robinson v. Neil,* 409 U.S. 505 (1973).

APPENDIX C

No. 80-2187

CHARLES EDWIN BULLARD
PETITIONER-APPELLEE,

V.

W.J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
RESPONDENT-APPELLANT.

United States Court of Appeals,
Fifth Circuit

Jan. 20, 1982

Appeal from the United States District Court for the Northern District of Texas.

Before POLITZ and RANDALL, Circuit Judges, and PARKER*, District Judge.

RANDALL, Circuit Judge:

The State of Texas appeals a determination by the district court, 502 F.Supp. 887, on petition for a writ of habeas corpus that Charles Edwin Bullard was placed in double jeopardy in violation of the fifth amendment to the United States Constitution. Subsequent to a conviction for theft, Bullard was subjected to two sentencing proceedings[1] to determine if he had committed two prior offenses which would lead to a finding of habitual offender status and to the enhancement, *i.e.*, increase, of his sentence to life imprisonment.[2] The second proceeding was ordered by the Texas Court of Criminal Appeals after it determined that, at a first habitual offender (or enhancement) proceeding, the proof by the

State that Bullard had committed one of the two prior offenses alleged in the indictment was insufficient.

The State asserts that the double jeopardy clause of the Constitution does not apply to enhancement proceedings. Alternatively, the State asserts that even if the double jeopardy clause bars a second enhancement proceeding when there has been a finding of insufficient evidence at the first proceeding, the United States Supreme Court decisions establishing that principle should not be made retroactive to invalidate Bullard's second enhancement proceeding and resulting life sentence which occurred before those decisions were rendered.

We hold that the double jeopardy clause bars a second enhancement proceeding when the evidence at the first enhancement proceeding was insufficient to establish that the defendant committed one or more of the prior offenses necessary for enhancement, and that this principle must be retroactively applied to Bullard's petition for a writ of habeas corpus.

I. THE FACTS

The State of Texas has custody of Bullard pursuant to a conviction, in Texas district court, for theft of property over the value of two hundred dollars but less than ten thousand dollars, a third degree felony. The indictment for theft also alleged, for enhancement of sentence purposes, two prior felony convictions: a 1970 conviction for burglary and a 1962 conviction for passing a forged instrument.

Bullard was found guilty by a jury of the offense alleged in the indictment. Pursuant to his written election, the jury was excused and the trial judge, after the state presented evidence[3] that Bullard was the same person who had committed the two prior offenses alleged in the

indictment, assessed punishment at imprisonment for life.

Bullard pursued a direct appeal of his conviction and on March 3, 1976, the Texas Court of Criminal Appeals upheld the conviction, *Bullard v. State*, 533 S.W.2d 812 (Tex. Cr. App. 1976), but held that the State's evidence was insufficient, under any acceptable method of proof,[4] to identify Bullard as the defendant who was convicted in one of the convictions alleged in the indictment and remanded to the trial court for a new punishment hearing. After a new sentencing hearing which resulted in imposition of a life sentence, Bullard appealed. His conviction and sentence were both affirmed by the Texas Court of Criminal Appeals. *Bullard v. State*, 548 S.W.2d 13 (Tex. Cr. App. 1977).

Bullard subsequently exhausted his state remedies by filing several post-conviction applications for a writ of habeas corpus under the Texas statutes. He then filed a federal habeas corpus petition, alleging six grounds of error. The district court rejected all grounds of attack except one: that his second enhancement proceeding violated the double jeopardy clause[5] of the United States Constitution. The court ordered Bullard discharged from custody unless retried or resentenced, in compliance with state law, within ninety days. The State appealed, challenging both the applicability of the double jeopardy clause to the enhancement proceedings of a trial and the retroactivity of controlling Supreme Court rulings to Bullard's conviction which occurred prior to those rulings. We address each argument in turn.

II. APPLICABILITY OF THE DOUBLE JEOPARDY CLAUSE TO ENHANCEMENT PROCEEDINGS

A. Purposes of the Double Jeopardy Clause

The double jeopardy clause of the fifth amendment which provides that, in criminal proceedings, no person shall be placed twice in jeopardy for the same offense, through seemingly clear in its language, has been difficult to apply to discrete fact situations when a claim of double jeopardy is raised because the double jeopardy clause is a multifaceted provision which serves several distinct jurisprudential interests and values, delineated from jurisprudential literature and decisions of the United States Supreme Court,

> [i]n ascending degrees of importance...are (1) an interest in finality ...; (2) an interest in avoiding double punishment which comes armed with a presumption in the defendant's favor; and (3) an interest in nullification—*vis.*, an interest in allowing the system to acquit against the evidence—which is absolute. These three interests are all loosely connected to the notion of ending litigation... But they are conceptually distinct and should be separately addressed.

Westen and Drubel, *Toward a General Theory of Double Jeopardy,* 1978 Supreme Court Review, 81, 86 (1979) (hereafter *Double Jeopardy Theory*). Phrased another way, the double jeopardy clause implicates recognized values of:

> (1)the integrity of jury verdicts of not guilty, (2) the lawful administration of justice, and (3) the interest in repose.

Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences,* 78 Mich. L. Rev. 1001, 1002 (1980) (hereafter *Three Faces of Double Jeopardy*).

Because there are several different and distinct values implicated, analysis of when a person is placed "twice"

in jeopardy for the "same offense" has presented complex problems and has resulted in inconsistency and confusion in judicial rulings.[6] Additionally, there are myriad circimstances during the course of a criminal prosecution which may suggest that the defendant is being unconstitutionally subjected to double jeopardy.

> [A]lthough the state may firmly believe it can prove a defendant guilty if given another opportunity, it may not retry a defendant following a mistrial declared over his objection if the declaration was capable of being "manipulated ... to allow the prosecution an opportunity to strengthen its case;" [*Illinois v. Somerville,* 410 U.S. 458, 469, 93 S.Ct. 1066, 1073, 35 L.Ed.2d 425 (1973)] nor following a declaration of any mistrial or the reversal of any conviction caused by deliberate prosecutorial harrassment or overreaching; [*see United States v. Dinitz,* 424 U.S. 600, 611 96 S. Ct. 1075, 1081, 47 L. Ed. 2d 267 (1976),] nor following a conviction for either exactly the same conduct; [*see Waller v. Florida,* 397 U.S. 387, 90 S. Ct. 1184, 25 L.Ed.2d 435 (1970),] or nearly the same conduct; [*see Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977),] ... nor following a trial that ultimately terminates in a basic failure of proof. [*See Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).]

Three Faces of Double Jeopardy at 1037 (footnotes omitted).

The attempts to apply the appropriate values to numerous, seemingly unrelated circumstances have created a body of law which, because of its complexity, must be carefully examined to define the values implicit in the double jeopardy clause and to identify the cir-

cumstances where those values are implicated.[7] This decisional law has additionally produced a plethora of legal literature in which attempts are made to explain why the clause is or is not applicable and to predict its application in future cases.[8] Unfortunately, neither in judicial decisions nor in legal literature are the complixities of the clause clarified and the inconsistencies reconciled so as to provide us with "explicit guidance" and a "bright line" analysis[9] to utilize in examining the question before us: whether a defendant may be subject to a sentencing proceeding a second time in order to prove facts necessary to show habitual offender status when a reviewing court has determined that, in a prior sentencing proceeding, the evidence was insufficient to sustain the habitual offender status and sentence determined by the finder of fact. We must thus undertake a careful examination of the double jeopardy clause, the implicit values it seeks to protect and the circumstances in which it is applied in order to determine whether the interests protected by the double jeopardy clause are implicated in this enhancement proceeding and whether a second proceeding would offend any of these values or interests.

B. *Implications of the Double Jeopardy Clause in Sentencing.*

Bullard was convicted of theft, a third degree felony. That conviction is not under attack here. Rather, Bullard attacks his subjection to a second *enhancement* proceeding which may be characterized as a retrial of the factual issue whether his sentence should be enhanced because of prior convictions after an initial finding of insuffcient facts to support habitual offender status.[10] Our analysis must focus on the question whether there are any values of the double jeopardy clause[11] implicated in this sentencing proceeding where Bullard's first enhanced sentence was reversed for insufficient evidence.

Case law for many years indicated that the values[12] which undergird the double jeopardy clause were not often implicated in many circumstances where sentencing or resentencing occurred.

> A defendant's punishment [can] be increased if his initial sentence is invalid, if his initial conviction and sentence are vacated and he is reconvicted and resentenced, if the legislature has statutorily authorized the government to appeal the defendant's sentence for such an increase, or if other limited conditions apply.

Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple—Punishment Prohibitation.* 90 Yale L.J. 632, 338-39 (1981) (hereafter *Multiple Punishment).* A sentence was not often considered to have constitutional finality which would indicate that, on resentence, the defendant was being tried *twice,see Bozza v. United States,* 330 U.S. 160, 166-167, 67 S.Ct. 645, 648-49, 91 L.Ed. 818 (1947), nor was the pronouncement of one sentence considered to be an implicit acquittal of any other sentence. *See North Carlina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). However, the double jeopardy clause did have implications in sentencing when there was a finding of multiple punishment.

> First, the multiple-punishment doctrine requires that the sentencing court take full account of all separate punishments imposed for a single offense. Thus, if a criminal defendant has been reconvicted and resentenced after successfully challenging his first conviction, he must receive credit for the period of imprisonment served after the first trial ...
>
> The second component of the doctrine prevents sentencing authorities from increasing the defendant's punishment after he has

> begun to serve his sentence. The trial court may not lengthen the period of punishment, increase the amount of a fine, or substitute a "more severe" type of sanction for a "less severe" one ...
>
> Finally, the multiple-punishment doctrine prohibits the sentencing court from imposing a sanction not authorized by the legislature. Thus, if the legislature provides for alternative and exclusive punishments and the defendant has completely satisfied one of those penalties, the sentencing court may not require the defendant to suffer the alternative penalty. The court, in addition, may not impose sentence for more than one offense unless the legislature clearly intended to sanction the defendant's conduct as a multiple offense.

Multiple Punishment at 636-640.

Bullard, however, correctly does not claim any double jeopardy violation because he has been subjected to multiple punishment. Instead he alleges that it is his subjection to a second *proceeding*, and of course the possible resulting finding of habitual offender status and increased sentence, after an appellate finding of insufficient evidence in the first proceeding, that violates his constitutional right. Bullard must somehow show that he has an interest protected by the double jeopardy clause, *i.e.*, a cognizable interest in finality in his first proceeding or an acquittal which occured when the evidence was found to be sufficient.

Bullard's task is, at first blush, made more difficult by the recent decision in *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). In that case the United States, after obtaining a conviction against DiFrancesco and an increase in his sentence of one year because he was a "dangerous special offender,"

appealed the enhancement sentence, pursuant to statutory authority,[13] requesting that the enhancement sentence be further increased because the trial court abused its discretion in giving an increased sentence of only one year. DiFrancesco claimed, in cross-appeal, the right of the government to appeal and the possible increase in sentence which could result violated the double jeopardy clause in that it subjected him to the possibility of a greater sentence and placed him, a second time, in jeopardy. 449 U.S. at 126, 101 S.Ct. at 431.

The Court refused to invoke the double jeopardy clause. In doing so, it set forth several principles of the clause in relation to sentencing:

> A. The Double Jeopardy Clause is not a complete barrier to an appeal by the prosecution in a criminal case. "[W]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *United States v. Martin Linen Supply Co.*, 430 U.S. at 569-570, 97 S.Ct., at 1353-1354, 51 L.Ed. 2d 642. *See also United States v. Wilson*, 420 U.S., at 342, 95 S.Ct. at 1021, 43 L.Ed.2d 232; *United States v. Scott*, *supra*.
>
> B. The double jeopardy focus, thus, is not on the appeal but on the relief that is requested, and our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation.
>
> C. This Court's decisions in the sentencing

area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal.

D. The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence.

449 U.S. at 130-137, 101 S.Ct. at 434-437.

We, however, are faced with a proceeding in which the availability of enhancement depended upon a finding that certain facts existed and where there has been an appellate determination of insufficient evidence at that proceeding to establish those facts. We are thus presented with a situtation markedly different than that presented in *DiFrancesco* in that, in *DiFrancesco,* there was no need for a second hearing in order for the appellate court to increase the sentence as provided in the statute nor had there been a finding of insufficient evidence to establish the factual predicate for the sentence by a trial or an appellate court. Nor is it analogous to the cases on which *DiFrancesco* relied, *e.g., North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Stroud v. U.S.,* 251 U.S. 15 (1919)' *Ball v. U.S.,* 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). where there was no question of insufficient evidence in an initial trial or sentencing proceeding.

C . *Implications of the Double Jeopardy Clause in a Finding of Insufficient Evidence.*

The question whether any values of the double jeopardy clause are implicated when there has been an appellate finding of insufficient evidence in a trial was addressed in *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).[14] There a defendant was convicted by a jury but the conviction was overturned by an appellate court because of insufficiency of the evidence at trial. The reversal was, according to the Court, tanta-

mount to an implicit acquittal[15] by the trial court.[16] 437 U.S. at 18, 98 S.Ct. at 2150.

The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State ... to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States,* 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); *see Serfass v. United States,* 420 U.S. 377, 387-388, 95 S.Ct. 1055, 1061-1062, 43 L.Ed.2d 265 (1975); *United States v. Jorn,* 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971).

> [W]hen a defendant's conviction has been overturned due to a failure of proof at trial, ... the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

437 U.S. at 11, 16, 98 S.Ct. at 2147, 2149. Thus a trial verdict or an appellate ruling[17] on insufficiency of the evidence implicates the interest of the defendant in

maintaining the integrity of the acquittal and calls for the utmost protection of the double jeopardy clause.[18] An acquittal of a defendant creates what is in most instances an absolute prohibition against retrial under the double jeopardy clause.[19] *Double Jeopardy Theory* at 84.

The focus of our question, considering that a finding of insufficiency of the evidence leads to an implicit acquittal, is whether such implicit acquittal is to be found when there is insufficiency of the evidence in an enhancement proceeding.

D. *Insufficient Evidence in Fact Finding Sentencing Proceedings.*

If *DiFrancesco* were our only authority for the application of the double jeopardy clause to sentencing, we would face a difficult task in reconciling *Burks* and its "implicit acquittal" theory to an enhancement proceeding. There is, however, an even more recent decision by the Court which does apply the implicit acquittal theory to the sentencing phase of a trial to bar a resentencing procedure. *Bullington v. Missouri*, _____U.S._____, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

In Bullington, the defendant was convicted of capital murder and sentenced by the jury to life in prison rather than to death, the other alternative for the jury under the applicable Missouri statute. Bullington was, after the verdict and sentence, able to show to the trial court that his trial was constitutionally infirm because of the systematic exclusion of women from the jury. The court granted a new trial. The state then gave notice that it would again seek the death penalty. Bullington claimed that subjection to a new hearing on whether the death penalty should be imposed would subject him to double jeopardy. On direct appeal, the Missouri Supreme court found no double jeopardy implications. The United States Supreme Court, Justice Blackmun (the author of

DiFrancesco) writing for the Court, held that because the jury had failed to find "whatever was necessary" to sentence Bullington to death, an implicit acquittal occured as to imposition of the death penalty in that sentencing proceeding. Bullington was protected by the double jeopardy clause from being subjected to a new hearing where the death penalty might be imposed.

The Court stated:

> Chief Justice Badgett, in his dissent from the ruling of the Missouri Supreme Court majority, observed that the sentence of life imprisonment which petitioner received at his first trial meant that "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence." 509 S.W.2d at 922. We agree.

_____U.S. at _____, 101 S.Ct. at 1861. The Court further stated other interests of the defendant entitled him to protection of the clause, including freedom from "embarrassment, expense and ordeal" and the "anxiety and insecurity" of a resentencing hearing where the death penalty might be invoked. *Id.*

The Court noted that the prior cases, *Pearce, Stroud and Ball,* had not applied the "acquittal" rationale to a sentencing proceeding, _____U.S. at _____, 101 S.Ct. at 1857, but found *Bullington* materially different.

> The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner Bullington at his first trial, however, differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by

> statute. Rather, a separate hearing was required and was held, and the jury was presented both a choice between two alternatives and standards to guide the making of that choice. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts. The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.

Moreover, the Court distinguished *DiFrancesco.*

> In only one prior case, *United States v. DiFrancesco,* has this Court considered a separate or bifurcated sentencing procedure at which it was necessary for the prosecution to prove additional facts ... The Government must prove the additional fact that the defendant is a "dangerous special offender," as defined in the statute, in order for the court to impose an enhanced sentence, but there are highly pertinent differences between the Missouri procedures controlling the present case and those found constitutional in *DiFrancesco.* The federal procedures at issue in *DiFrancesco* include appellate review of a sentence "on the record of the sentencing court,"... not a *de novo* proceeding that gives the Government the opportunity to convince a second factfinder of its view of the facts. Moreover, the choice presented to the federal judge ... is far broader than that faced by the state jury at present petitioner's trial. Bullington's Missouri jury was given—and under the State's statutes

> could be given—only two choices, death or life imprisonment. On the other hand, if the Federal Government proves that a person convicted of a felony is a dangerous special offender, the judge may sentence that person to "an appropriate term not to exceed twenty-five years and not disproportionate in severtiy to the maximum term otherwise authorized by law for such felony." § 3575(b). Finally, although the statute requires the Government to prove the additional fact that the defendant is a "dangerous special offender," it need do so only by a preponderance of the evidence. *Ibid.* This stands in contrast to the reasonable doubt standard of the Missouri statute, the same standard required to be used at the trial on the issue of guilt or innocence. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The State's use of this standard indicates that, as has been said generally of the criminal case, "the interests of the defendant are of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment ... [O]ur society imposes almost the entire risk of error upon itself." *Addington v. Texas,* 441 U.S. 418, 423-424, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979).

_____U.S. at _____, 101 S.Ct. at 1858-59.

Finally, the Court cited, with approval, the holding in *Burks* that insufficient evidence leads to a finding of an acquittal, _____U.S. at _____, 101 S.Ct. at 1860, and concluded:

> The Court already has held that many of the protections available to a defendant at a

> criminal trial also are available at a sentencing hearing similar to that required by Missouri in a capital case. See, e.g., *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (due process protections such as right to counsel, right to confront witnesses, and right to present favorable evidence are available at hearing at which sentence may be imposed based upon "a new finding of fact ... that was not an ingredient of the offense charged," *id.*, at 608, 87 S.Ct. 1211). *Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him,* with respect to the death penalty, at his retrial.

_____U.S. at _____, 101 S.Ct. at 1862 (emphasis added).

Thus the Supreme Court decision indicates that after a death penalty sentencing proceeding, where there is an implicit acquittal from the death penalty based on facts presented, the defendant , by virtue of that implicit acquittal, is protected by the double jeopardy clause from subjection to a second hearing where the death penalty may be imposed.

E. *Applicability of DiFrancesco, Burks and Bullington to this Case.*

The ultimate question is whether Bullard has a cognizable interest indentified in the double jeopardy clause. Applying the rationale of *Burks* and *Bullington*, we find that Bullard has an interest in maintaining the integrity of his acquittal which occurred because of insufficiency of the evidence and that he cannot be subjected to another attmept by the State to prove what it failed to prove initially. The language of the Court in

DiFrancesco, the reasoning of *Bullington*, which adopted the *Burks* rationale and the distictions drawn by the Court in *Bullington* provide, if not explicit guidance toward a bright line analysis, a conceptual framework in which we may consider Bullard's case.

Initially we set forth the unique aspects of the Texas enhancement proceeding.[20] The State is required to prove *at trial* that the defendant had committed two prior felony offenses.[21] The two prior convictions must be alleged in the indictment, *Bell v. State*, 387 S.W.2d 411 (Tex. Crim. App. 1965), *aff'd sub nom., Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967), and upon review the allegations are treated the same as allegations of the elements of a substantive offense. *See Plessinger v. State*, 536 S.W.2d 380 (Tex. Crim. App. 1976). Additionally, Texas case law supports the premise that the allegations of prior convictions must be proven beyond a reasonable doubt.[22] *Jackson v. State* 571 S.W.2d 1, 2 (Tex. Crim. App. 1978). In summary, the existence of one or more prior convictions is an essential fact issue upon which the State has the burden of proof in order to enhance the punishment.[23] Additionally, any attempt to reinstate the enhancement to life would, after a finding of insufficient evidence by the Texas Court of Criminal Appeals, require a new hearing requiring a second attempt by the State to prove facts suffcient to support enhancement. *See Bullard v. State*, 533 S.W.2d at 816.

With this factual background we now examine the relevant case law, *Burks*, *Bullington* and *DiFrancesco*, for guidance.

We begin first with the principle of *Burks* that a reversal of a conviction because of insufficiency of the evidence at trial is to be treated as an acquittal. 437 U.S. at 18, 98 S.Ct. at 2150. A reversal because of trial error, however, is not to be so treated. 437 U.S. at 16-17,

98 S.Ct. at 2149-2150. The Court, in *Burks*, characterized reversal for insufficiency of the evidence as occurring when there is failure of proof as to guilt or innocence after the proscecution has "been given one fair opportunity to offer whatever proof it could assemble." 437 U.S. at 16, 98 S.Ct. at 2149. On the other hand, a reversal for trial error

> as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the [prosecution] has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.

437 U.S. at 15, 98 S.Ct. at 2149.

The first question that we face is whether the failure of the State to prove, by *any* acceptable method,[24] that Bullard was the person who committed one of two alleged prior offenses is an "insufficiency of the evidence" error as opposed to a "trial error."

The State characterizes the error as a trial type error rather that as insufficiency of the evidence, relying on *Porier v. State*, 591 S.W.2d 482 (Tex. Crim. App. 1980). In *Porier*, the court, when confronted with a question whether insufficient evidence in an enhancement proceeding implicates the double jeopardy clause, construed the absence of proof of *when* alleged prior offenses were committed as trial error rather that insufficientcy of evidence, although the court in its opinion stated that "the evidence is unsufficient to prove the facts necessary for enhancement to life imprisonment ...

" 591 S.W.2d at 483. The court rationalized that:

> The type of error here is the type of trial error which, although it rendered the original proceeding "defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence", does not prohibit full readjudication of the original proceedings ... The prior conviction is not a question of fact which determines the guilt or innocence of appellant; rather, it is an historical fact. The error in improper proof then goes to the method of proof, not the validity of the event.

591 S.W.2d at 484. Additionally, the court seemed to premise its holding that there were no double jeopardy implications on the concept that the habitual offender sentencing proceeding did not encompass the concept of an offense within the meaning of the double jeopardy clause. *Id.* at 483.

Our examination of the Texas court's concept of trial error in an enhancement proceeding leads us to the conclusion that, after *Bullington,* this characterization can no longer be viable.

Initially, after *Bullington,* death penalty sentencing proceedings are explicitly within the penumbra of the double jeopardy clause. Implicity, enhancement proceedings such as this Texas proceeding, where there are findings of fact similar to the findings in the guilt phase of the trial, are also within the penumbra. *See Bullington* _____ at _____, 101 S.Ct. at 1861-62. The Court, in both *Bullington* and *DiFrancesco,* emphasized that where there is a possibility of a second fact finding hearing at the sentencing phase the double jeopardy clause is implicated. The distinction that the enhancement proceeding is not encompassed because it is not an "offense" or that it is dissimilar to findings of fact of guilt or innocence is simply no longer viable.

While we are mindful that a state's charaterization of error will be accepted by this court when the error so characterized is clearly trial error as indentified in *Burks, Tapp v. Lucas,* 658 F.2d 383 (5th Cir. 1981),[25] we cannot allow a state court's characterization of error as trial error to erode the constitutional mandate of the double jeopardy clause. In *Burks* and again in *Bullington* the Court emphasized that failure of the prosecution to prove facts when it has an unfettered opportunity to do so results in reversible error because of insufficient evidence. "This is not like the case where evidence prejudicial to the defendant is admitted [or evidence beneficial is omitted] at the first trial, and a conviciton obtained [and then reversed]." *United States v. Barker,* 558 F.2d 899, 902 (8th Cir. 1977). Here the State will not, in a second proceeding, simply put on evidence which was erroneously excluded. It will, instead, have to put on evidence that the State, by its own error, failed to present at the first hearing. This circumstance would be identical to that forbidden in *Burks* and *Bullington* under the rationale that there had been implicit acquittal because of insufficient evidence, and is forbidden here.[26]

Fianally, we note that if we were always to accept a state's characterization of error as trial error for purposes of habeas corpus review, a state could effectively prevent any error from being characterized as insufficientcy of evidence and implicating the valued right to acquittal inherent in the double jeopardy clause. Here where the state's characterization militates against the clear language of *Burks* and the obvious failure of proof which occurred, and when in fact, the state court described the error as "failure of proof" we find that the correct interpretation of the error was that there was an appellate finding of insufficient evidence.[27]

Because the evidence of habitual offender status was insufficient, we next turn to the question whether this

insufficiency amounted to an implied acquittal under *Bullington.*

The analogy of the Texas procedure to that in *Bullington* has been well stated:

> All the procedural hallmarks of the trial on guilt or innocence that underlie the decision in *Bullington v. Missouri,* _____U.S._____, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), are present when the jury decides whether a defendant is an habitual felony offender. There is a separate proceeding, a requirement of proof of additional facts beyond a reasonable doubt, an explicit standard to guide the jury, and a choice of only two alternatives.

Wallace v. State, 618 S.W. 67, 80 n.2 (Tex. Crim. App. 1981) (Roberts J., dissenting).

Even in *DiFrancesco,* the Court distinguished its case where double jeopardy was not implicated from one as we have before us:

> We have noted above the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations, however, have no significant application to the prosecution's statutorily granted right to review a sentence. *This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence* ... Furthermore, a sentence is characteristically determined in large part on the basis of information, such as the presentence report,

> developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversarial in nature.

449 U.S. at 136, 101 S.Ct. at 437 (emphasis added).

The distinctions from *DiFrancesco* in the case before us are clear—there was no statutorily granted appeal to the State of Texas to provide for a review of the habitual offender status; any imposition of a life sentence would require a new factual hearing, as opposed to *DiFrancesco*, where a sentence could be enhanced by an appellate court on review of the record only; a finding here necessitated proof beyond a reasonable doubt, in *DiFrancesco* only by a preponderance of the evidence.

While the Court in *DiFrancesco* refused to ascribe to any sentence the status of acquittal, its cautious approach in limiting its holding and distinguishing the factual context in which it was appropriate suggested that other sentencing proceedings might implicate the values of the double jeopardy clause. *Bullington* provides the gap left by *DiFrancesco* required for our analysis of this case and mandates application of the double jeopardy clause to the case before us.

In summary, our analysis shows that the implicit acquittal theory of *Burks* must be applied after *Bullington* to bar a second enhancement proceeding in the sentencing phase of a trial[28] where there has been a finding of insufficient evidence of habitual offender status.[29]

Secondly, "embarrassment, expense and ordeal" and insecurity may attend a sentencing proceeding as well as a trial. *Bullington*, _____U.S. at_____, 101 S.Ct. at 1861. Furthermore, where, in *Bullington* and this case, the state must prove facts "beyond a reasonable doubt", with the recognition that "[i]t is the State, not

the defendant, that should bear 'almost the entire risk of error.' *Addington v. Texas*, 441 U.S., at 424, 99 S.Ct., at 1808, *id.* at 1861," we find that Bullard should not bear the risk of the State's error.[30]

Because Bullard was once subjected to an enhancement proceeding, because the appellate court found insufficient evidence of habitual offender status, thus leading to Bullard's implicit acquittal as a habitual offender, and because resentencing would require a second trial with the State having an unwarranted "second bite at the apple" to prove facts that it failed to prove initially, the double jeopardy clause bars this second trial-like enhancement to life proceeding.

III. RETROACTIVITY OF *BURKS* AND *BULLINGTON*

Having determined that *Burks* and *Bullington* prohibit a second trial for the purposes of enhancement of a sentence, we now face the question whether the principles established in *Burks* and *Bullington* prohibited a second trial for the purpose of enhancement of Bullard's sentence, that is, whether the principles established in *Burks* and *Bullington* are "retroactive" in application so as to vacate Bullard's life sentence which was handed down in a second sentencing hearing prior to the rulings in *Burks* and *Bullington.*

The question before us is not a simple one. The court below held that *Burks* provided the supporting rationale for its determination that the double jeopardy clause was applicable to Bullard and also determined that *Burks* should be applied retroactively. Because we, however, premise our decisions on both *Burks* and *Bullington,* we must look to see if both decisions are retroactive, thus applying to Bullard's case.

The retroactivity of *Burks* has been discussed in

several cases[31]; in determining whether *Bullington* is retroactive, we write on a virtually clean slate. The approach to retroactivity, however, involves asking the same questions of *Burks* and *Bullington*. We thus set forth the principles applicable to retroactivity in the double jeopardy context before we analyze *Burks* and *Bullington* to determine whether either or both are to be applied retroactively.

A. *Retroactivity of the Constitutional Protection Against Double Jeopardy*

Retroactivity has been defined as follows:

> In precise language, prospective operation means that the overruling decision is operative in the future only and does not even affect the parties to the overruling case. Retroactive, or retrospective, operation refers to an overruling decision, the operation of which is not limited solely to events occurring after the time of the decision. Such retroactive or retrospective operation may apply to the parties in the overruling case, or to the parties in other pending cases in addition to the overruling case, or to past transactions where no litigation was commenced before the overruling case was decided or which have been adjudicated in a final judgment, *i.e.*, a judgment no longer subject to appeal or writ of error or a similar remedy of review. Overruling decisions which are given effect only in the overruling case itself and in pending cases are properly referred to as being of "limited" retroactive effect, and decisions which have retroactive effect going beyond the overruling case and others pending are properly referred to as being of "unlimited" or "general" retroactive effect.

Rossum, *New Rights and Old Wrongs: The Supreme Court and the Problem of Retroactivity,* 23 Emory L.J. 381, n.2(1974).

Until 1965, a presumption existed that constitutional rulings were to be given retroactive effect.[32] In 1965, however, in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the United States Supreme Court charted new ground, 381 U.S. at 628 and n.13, 85 S.Ct. at 1737 and n. 13, holding that with respect to new constitutional interpretations involving criminal rights "the Constitution neither prohibits nor requires retrospective effect." 381 U.S. at 629, 85 S.Ct. at 1737. *Linkletter* and succeeding cases established factors for determining which constitutional rules were to be accorded retrospective effect and which prospective effect only. These factors, as summarized in *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), emphasize (1) the purpose to be served by the new standards, (2) the extent of reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standards. *See Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969).

In 1973, the Court discussed retroactivity in the double jeopardy context. *Robinson v. Neil,* 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973). The Court held retroctive the proscription against prosecution for the same crime in municipal court and again in state court. Such prosecution had previously been declared violative of the double jeopardy clause in *Waller v. Florida,* 406 U.S. 906, 92 S.Ct. 1608, 31 L.Ed.2d 816 (1972). Thus, *Waller* applied to Robinson's conviction which occurred prior to the *Waller* decision. The Court initially distinguished traditional procedural cases where the mode of analysis had been set forth in *Linkletter* and its progeny, 409 U.S. at 507, 93 S.Ct. at 877, stating:

> We do not believe that this case readily lends itself to the analysis established in *Linkletter.* Certainly, there is nothing in *Linkletter* or those cases following it to indicate that all rules and constitutional interpretations arising under the first eight Amendments must be subjected to the analysis there enunciated. *Linkletter* itself announced an exception to the general rule of retroactivity in a decision announcing that the exclusionary rule of *Mapp v. Ohio,* 367 U.S. 643 [81 S.Ct. 1684, 6 L.Ed.2d 1081](1961), would be given prospective effect only. *Linkletter,*...dealt with those constitutional interpretations bearing on the use of evidence or on a particular mode of trial. Those procedural rights and methods of conducting trials, however, do not encompass all of the rights found in the first eight Amendments. Guarantees that do not relate to these procedural rules cannot, for retroactivity purposes, be lumped together in terms of analysis. For the purpose and effect of the various constitutional guarantees vary sufficiently among themselves so as to affect the neccessity for prospective rather than retrospective application.

409 U.S. at 507 508, 93 S.Ct. at 877-878.

The Court further found that, when confronted with a question of retroactivity of the double jeopardy clause, the appropriate question is not whether the rule is necessary to protect the integrity of the fact finding process. 409 U.S. at 508, 93 S.Ct. at 877. The Court ultimately determined that "[t]he prohibition against being placed in double jeopardy is likewise not readily susceptible of analysis under the *Linkletter* line of cases," *id.*, and that

> [t]he guarantee against double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. *While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather that to prescribe procedural rules that govern the conduct of a trial. A number of the constitutional rules applied prospectively only under the Linkletter cases were found not to affect the basic fairness of the earlier trial, but to have been directed instead to collateral purposes such as the deterrence of unlawful police conduct, Mapp v. Ohio, supra. In Waller, however, the Court's ruling was squarely directed to the prevention of the second trial's taking place at all, even though it might have been conducted with a scrupulous regard for all of the constitutional procedural rights of the defendant.* (emphasis added).

409 U.S. at 509, 93 S.Ct. at 878.

Unfortunately, the Court did not expound to any great length on whether rulings implicating the double jeopardy clause should always be retroactive and, if not, under what circumstances they should be retroactive.

The Court, however, indicated that *Linkletter* reliance would not be "wholly absent"[33] in the double jeopardy context, implying that reliance might prevent retroactivity, 409 U.S. at 509, 93 S.Ct. at 878, and in fact considered it in examining whether the State of Florida should have, prior to *Waller*, been aware that it could not bring state court charges after indentical municipal court charges had been filed. The Court found that:

"the state's justifiability of the reliance on lower court decisions supporting the dual sovereignty analogy was a good deal more dubious than the justification for reliance that has been given weight in our *Linkletter* line of cases. We intimate no view as to what weight should be accorded to reliance by the State that was justifiable under the *Linkletter* test in determining retroactivity of a non-procedural constitutional decision such as *Waller*.

409 U.S. at 510 11, 93 S.Ct. at 878-79.

Thus, in *Robinson*, the Court, while seeming to distinguish procedural from non-procedural rulings, did not eschew consideration of justifiable reliance, instead considering and finding that such reliance was not justified.

After *Robinson*, with its intimation that reliance is to be considered to some degree, the Court, when confronted with a question of retroactivity in the procedural context, seemingly narrowed the circumstances in which reliance is to be considered, stating that reliance, after *Robinson*, is only a consideration "when the purpose of the rule in question [does] not clearly favor either retroactivity or prospectivity." *Brown v. Louisiana*, 447 U.S. 323, 328, 100 S.Ct. 2214, 2219, 65 L.Ed.2d 159 (1979) (citations omitted).

With *Robinson* and *Brown* for guidance, we now address the question whether the double jeopardy rulings of *Burks* and *Bullington* should be retroactive to apply to the resentencing of Bullard which occurred prior to the decisions in *Burks* and *Bullington*.

As in all double jeopardy cases, the decisions in *Burks* and *Bullington* are squarely directed to the prevention of second trials and the concomitant conviction or enhancement of sentence which may follow from those second trials. These decisions are markedly different

from decisions, such as *Linkletter*, setting forth procedural rules which speak only to the manner of how trials are conducted. There the question is whether second trials are necessary to insure the protection of defendants convicted under the old unconstitutional rule and thus whether the rule must be applied retroactively. Rather, *Burks* and *Bullington* seek completely to prevent second trials and must be given retroactive effect to insure a defendant's right to be free from double jeopardy. As the district court stated,

> Unlike retroactivity of procedural guarantees such as the exclusionary rule, see *Linkletter, supra*, retroactivity of the *Burks/Greene* aspect of the guarantee against double jeopardy will not interfere with the results of trials fair in other respects, thereby resulting in a burden on our system of justice and a windfall to those lucky enough to escape reprosecution. *Burks* and *Greene* instead teach that second trials should not have been held at all, and that another reprosecution would be barred. Retroactivity of those decisions thus serves rather than disserves the ends of justice.

Where no trial should have been held, there cannot be a question, as in procedural rulings, whether the defendant, in spite of the unconstitutional ruling, was treated fairly at trial. As *Burks* and *Bullington* indicate, the double jeopardy clause forbids a second enhancement hearing; thus only if Bullard's second sentencing hearing is nullified by retroactive application of *Burks* and *Bullington* will he receive the protection the double jeopardy clause intended.

Moreover, "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial *and possible conviction* more than once for an alleged

offense." *Greene v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957) (emphasis added). If the risk of conviction created by a second trial is unacceptable under the double jeopardy clause, then the enhancement of the sentence which is the result of that risk should also be unacceptable. Because the defendant has, according to the principles of *Burks* and *Bullington*, been implicitly acquitted of habitual offender status mandating life imprisonment and the resulting sentence, he should not be allowed to suffer the results of an unconstitutional second hearing, *i.e.*, a life sentence, because he was not to be able to halt the second hearing through available legal channels.[34]

To the extent that reliance by the State on the former rule is a consideration after *Robinson* and *Brown*, we find it unpersuasive here. The State claims that it relied on prior *Burks* law that it could retry Bullard. We note, however, that *Texas* law, prior to Bullard's appeal, had prohibited retrial and new proof. *Elizalde v. State*, 507 S.W.2d 749 (Tex. Crim. App. 1974). The State, when it failed to prove, at Bullard's first trial, the facts supporting an enhanced sentence, should have had *no* belief that it could retry him. Texas law, until *Elizalde* was overruled in *Bullard*, allowed only one attempt by the State to prove the facts necessary to establish habitual offender status. The prosecutor, contrary to the State's contention, should have been aware he had one, and only one, opportunity to prove his case.

Moreover, we find the claim of prejudice to the State equally unpersuasive. The Court in *Robinson* found that the State was prejudiced by its holding of retroactivity. I was of the opinion, however, that the State should have been aware of the constitutional impropriety of its action. Here, where the State has had one complete, unencumbered chance to prove the facts necessary for enhancement, "the prosecutor cannot complain of prejudice, for it has been given one fair oppor-

tunity to offer whatever proof it could assemble." *Burks, supra*, 437 U.S. at 16, 98 S.Ct. at 2149. As the Texas Court of Criminal Appeals stated:

> This is wholly unlike the issue of retroactivity where the alternatives are whether the State can obtain a conviction without observation of the new rule, or must seek a conviction, if any, in compliance with the new rule. The issue under *Burks-Greene* is whether the State should be allowed a post-acquittal conviction, and no changes in the rules for obtaining it are implicated. As stated in *Burks*, "Given the requirements for entry of a judgment of acquittal, the purposes of the Clause would be negated were we to afford the Government an opportunity for the proverbial 'second bite of the apple.'"

Ex Parte Reynolds, 588 S.W.2d at 903.

In summary, there is no indication that the decisions in *Burks* and *Bullington* should not be retroactive.[35] To the contrary, the purpose of the double jeopardy clause mandates their retroactivity to Bullard's request for habeas relief.[36]

The judgment of the trial court is hereby affirmed in all respects.[37]

AFFIRMED

APPENDIX C

FOOTNOTES

1. In Texas, criminal trials are bifurcated. Tex. Penal Code Ann. §37.07(Vernon)(1974). After the determination of guilt the jury is then appraised of circumstances affecting sentence (such as prior convictions, see note 2, *infra*) and the jury, or the judge if the defendant has elected to waive a jury, assesses punishment. This sentencing proceeding where the state must prove beyond a reasonable doubt that prior convictions occurred is a part of the trial . Tex. Penal Code Ann. §12.42 (Vernon)(1974). See note 2, *infra*.

2. In Texas, conviction of a felony after one or more prior convictions mandates that the sentence be increased or "enhanced" up to, and including, possible imposition of a life sentence. The defendant is known as an habitual offender.

(a) If it be shown on the trial of a third-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a second-degree felony.

(b) If it be shown on the trial of a second-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a first-degree felony.

(c) If it be shown on the trial of a first-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more that 99 years or less than 15 years.

(d) If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.

Tex. Penal Code Ann. § 12.42 (Vernon)(1974).

3. At the enhancement proceeding, the trial court heard evidence concerning the State's allegations that Bullard had two prior convictions. Deputy Sheriff John Slovak, a fingerprint expert from the Dallas County Sheriff's Department, testified that he had taken

Bullard's fingerprints earlier that day. He testified that, in the supporting documents of each prior conviction, one Charles Edwin Bullard was the man named as the convicted defendant. Further, each prior conviction contained a set of fingerprints. Bullard's fingerprints taken the day of trial were identified as State's Exhibit No. 1. The conviction and fingerprints in cause No. C-70-6579-MN were identified as State's exhibit No. 2. The record of the conviction and fingerprints in Cause No. D-7519-JI were identified as State's Exhibit No. 3. Deputy Slovak compared the fingerprints on State's Exhibit No. 2 with those he had taken of Bullard earlier that afternoon and testified that they were made by the same person. However, Deputy Slovak was not asked to compare the fingerprints he had taken of Bullard with those on State's exhibit No. 3; at no time did he testify that the fingerprints he had taken from Bullard were make by the same person whose fingerprints appeared on State's Exhibit No. 3. Thus there was absolutely *no* positive identification of Bullard as the man who had committed a *second* prior offense.

4. The Texas Court of Criminal Appeals has approved several different means to prove that a defendant is the same person previously convicted:

This Court has approved several different means to *prove* the accused was the same person previously convicted. They include, but are not necessarily limited to: (1) Testimony of a witness who identifies the accused as the same person previously convicted; (2) Introduction of certified copies of the judgment and sentence and records of the Texas Department of Corrections or a county jail including fingerprints of the defendant, supported by expert testimony identifying them as identical with known prints of the defendant; (3) And by stipulation or judicial admission of the defendant. (citations omitted)(emphasis added).

Cain v. State, 468 S.W.2d 856, 859 (Tex. Cr. App. 1971).

5. The double jeopardy clause states:

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...

U.S. Const. amend. V.

6. This state of the law of double jeopardy has been acknowledged by the United States Supreme Court itself. See *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). The reasons

for the problems are examined fully in Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Supreme Court Review 81 (1979)(hereafter *Double Jeopardy Theory*).

7. *See, e.g., Burks v. United States, supra*, where the Court reviews and overrules several cases dealing with the question whether a reversed conviction implicates the double jeopardy clause.

8. See Double Jeopardy Theory at 81-161 for a thorough analysis of double jeopardy values and the circumstances in which those values are implicated.

9. This "bright line analysis" was the hope of the Court in its decision in *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975). However, Justice Rehnquist, who wrote the opinion in *Jenkins*, later writing for the Court in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), admitted that "[w]e believe we have pressed too far in *Jenkins*." 437 U.S. at 100, 98 S.Ct. at 2198.

10. Facts necessary to enhance sentence are, in Texas, considered to be among those facts proved at trial. See note 1 and note 2, *supra*.

11. See note 12, *infra* and *Double Jeopardy Theory* at 106-122.

12. Finality, the integrity of acquittal and prevention of multiple punishment have been articulated as the purposes of the double jeopardy clause. See *Double Jeopardy Theory* at 84, and text, supra at 4-5.

13. 18 U.S.C. § 3736 (1976).

14. *Burks* was made applicable to state prosecutions where there is an appellate reversal for insufficient evidence in *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). *See Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)(holding that the double jeopardy clause is applicable to the states through the fourteenth amendment). *See also Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

15. "The Supreme Court ... developed a definition of acquittal as "the ruling of the judge, whatever its label, [which] actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' *Martin Linen* [*United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642]...at 571 [97 S.Ct. at 1354]." *Scott*, 437 U.S. at 97, 98 S.Ct. at 2197.

Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

16. This rationale has been criticized, *see Double Jeopardy Theory* at 146, but the Court has continued to utilize it and has cited it with approval in its most recent double jeopardy case. *Bullington v. Missouri*, _____U.S._____, 101 S.Ct. 1852, 1860, 68 L.Ed.2d 270 (1981).

17 Whether an acquittal by a trial judge—implicit or explicit—should be given the same weight as an acquittal by a jury has been the subject of legal comment. *Double Jeopardy Theory* at 132-137. The Supreme Court, however, has refused to make such a distinction, and a judge's ruling of acquittal or an appellate court's finding that the judge should have acquitted, *Burks*, 437 U.S. at 16, 98 S.Ct. at 2149, entitles the defendant to protection of the double jeopardy clause. *Scott*, 437 U.S. at 91, 98 S.Ct. at 2193; *United States v. Sanabria*, 437 U.S. 54, 64, 98 S.Ct. 2170, 2178, 57 L.Ed.2d 43 (1978).

18. Two commentators suggest that not all findings of *Burks* type insufficiency of the evidence support invocation of the double jeopardy clause. Westen & Drubel, *Double Jeopardy Theory* at 146-47. While their analysis arguably confuses the *Burks* concept of sufficiency of evidence with the *Burks* concept of trial errors, see note 25, *infra*, and accompanying text, we need not determine it, if indeed, the Court in its decisions has established different types of insufficiency of the evidence for purposes of double jeopardy, for even under the theory advanced above, that insufficient evidence only prevents retrial when the prosecution "has no excuse for not having mustered sufficient evidence the first time around," *id.* at 147, n. 292, such is the case before us, that is, the prosecution has presented no reason why it failed to muster sufficient evidence for enhancement the first time around.

19 The case before us must be distinguished from those where the double jeopardy clause has (or has not) been invoked on appeal after a favorable ruling by a trial judge in a trial by jury or a bench trial in cases other than sufficiency of the evidence. For example, in *United States v. Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1974), the Court allowed an appeal of a post-jury judgment of acquittal by a trial judge which invalidated the jury verdict of guilty. The Court found that the government appeal could, at the most, reinstate a valid jury verdict without need for a new trial. The Court has not been willing to allow a factual rehearing to prove facts after a ruling by the trial or appellate court of insufficient evidence. In the case before us, there was from the beginning an invalid verdict of enhancement. There is no valid verdict of enhancement to life imprisonment which can be reinstated without a second hearing.

This case is additionally unlike one where a sentence, based upon one count of a valid conviction, is altered when another sentence, based on another count of the conviction, is ruled invalid and vacated. *See U.S. v. Busic*, 639 F.2d 940 (3rd Cir. 1980).

20. The statute is set forth at note 2, *supra*.

21. The bifurcated nature of Texas criminal trials requires a factual finding of guilt first and then a separate sentencing phase. Here the sentencing phase was also a factual hearing which, according to the language of the statute was part of the "trial." *See* note 1 and note 2, *supra*.

22. The State has not disagreed that this standard is applicable. We note also that we do not intend to review the Texas court's finding of insufficiency of the evidence, but rather inquire whether beyond a reasonable doubt is the applicable standard to see if there is an analogy to the "beyond a reasonable doubt" standard of *Bullington* that was persuasive to the Court in finding that the double jeopardy clause applied. _____U.S. at _____, 101 S.Ct. at 1859.

23. The State attempts to characterize imposition of the habitual offender status as merely "a reason for more severe punishment." This characterization overlooks the statutory language and the decsions of the Texas Court of Criminal Appeals which require a factual finding of this status as an habitual offender. It is the question whether a defendant may be subjected to this fact finding procedure and the risk of enhancement a second time after the state initially failed to prove sufficient facts the first time which raises implications of double jeopardy—not just the possibility that Bullard will be subjected to a more severe sentence.

Additionally, the State alleges that the rationale for the district court's opinion was that double punishment for one offense would occur if Bullard were resentenced. We find no such language in the court's opinion. Rather, the question addressed and correctly decided by the court was whether the State is to be afforded a second chance to muster evidence found insufficient in the first proceeding, *cf. Burks v. United States*, *supra*, 437 U.S. at 11, 98 S.Ct. at 2147, to impose a sentence which would have been lawful had sufficient evidence been adduced to support it. The court's discussion of characterization of the Texas statutory scheme as two offenses, one a lesser included offense of the other, was not for the purpose of saying that double punishment had occurred—but rather in saying that the lesser sentence involved an implicit acquittal of the greater sentence. *Cf. Burks v. United States, supra.*

Finally, whether Texas could be compelled under the Constitution to hold and adversarial trial on punishment issues and demand proof of prior convictions beyond a reasonable doubt is irrelevant. It is beyond dispute that state procedures not in themselves constitutionally mandated must be applied within the strictures of the Constitution. *Cf. Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (appeals provided by state, while not themselves constitutionally requirred, must be provided to all in accordance with the equal protection clause).

24. See note 3 & note 4, *supra*.

25. In Tapp, the Mississippi Supreme Court had characterized a state trial court's compulsion of a wife's testimony as trial error (in the language of *Burks*, an "incorrect receipt of evidence") and allowed retrial of a defendant whose conviction had been overturned because of this erroneously admitted testimony. This court, because the error was clearly trial error, recognized it could defer to Mississippi's characterization and did so. *Tapp v. Lucas*, 658 F.2d 383, 385 (5th Cir. 1981).

26. We note that the decision in *Porier, supra*, which was the basis of the ruling that failure of proof in an enhancement proceeding was trial error was a five to four decision which was questioned at the time, *id.* at 484-85 (Odom, J. dissenting), and after *Bullington, Wallace v. State*, 618 S.W.2d 67 (Tex.Cr. App. 1981) (Roberts, J. dissenting).

27. Additionally, the State's reliance on *Burks, supra*, and *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), for the proposition that the error here was not insufficiency of the evidence is misplaced. In *Burks*, "trial errors" which would not implicate the double jeopardy clause included failure to dismiss a faulty indictment, improper instruction and erroneous admission of evidence. Obviously these errors are materially different than the failure of proof in Bullard's case. Additionally, the Court in *Burks*, while finding that an improper sentence might not warrant invocation of the double jeopardy clause, citing, at 14, n.8, 98 S.Ct. at 2148 n.8, to an early English case, *Queen v. Drury*, 3 Cox Crim. Cas. 544, 175 Eng. Rep. 516 (Q.B.1849), referred only to an "improper sentence," *i.e.*, one beyond the statutory authorization, not one imposed in spite of insufficient evidence. In *Queen v. Drury, supra*, there was no conviction in a *factual* sentence hearing—thus there could be no question of sufficiency of the evidence in a *sentencing proceeding* presented and addressed in *Burks*. As the Court implicitly found in *Bullington, supra*, a finding of insufficient evidence

(or an appellate reversal of an improper finding of sufficient evidence) is an acquittal in a *sentencing* proceeding—thus it cannot be said that in improper factual determination is a mere "improper sentence" amounting to no more than a trial error. In *Bullington*, the Court recognized that insufficiency of the evidence in a factual sentencing proceeding did implicate the double jeopardy clause to bar a resentencing hearing where the higher sentence might be imposed. *Bullington*, not *Queen v. Drury*, is appropriate authority.

Secondly, *Jackson v. Virginia* is inappropriate as authority for the proposition apparently advanced by the State that there was in fact no insufficient evidence. *Jackson* establishes the federal standard for appellate review to determine whether evidence is so insufficient to violate due process in a state criminal trial. We, here, however, are not conducting a review of sufficiency of the evidence in a due process context—that evidence has been reviewed and found insufficient, according to insufficiency standards of the double jeopardy clause, *see Burks* at 437 U.S. 14-18, 98 S.Ct. 2148-2150, by the Texas Court of Criminal Appeals. The question before us is rather whether—considering that the evidence to support enhancement was insufficient—the State is precluded from subjecting Bullard to a second enhancement proceeding to try to prove its case.

28. While Justice Blackmun spoke in terms of a capital sentencing proceeding, he did not limit his rationale of acquittal to fact finding sentencing proceedings concerned only with the death penalty nor do we see any reason to do so. The important factors persuasive to the Court in *Bullington*, a trial like proceeding where the burden of proof is beyond a reasonable doubt where the government asks for a second "bite at the apple," are present here.

29. Justice Rehnquist, dissenting in *Bullington*, stated that: "The sentencer's function is not to discover a fact, but to mete out just deserts as he sees them." _____U.S. at _____, 101 S.Ct. 1864.

In *Bullington*, however, and in the case before us, the prosecution *was* required to set forth, and the sentencer to determine, facts beyond a reasonable doubt. It is the further need for a second factual discovery that warrants invocation of the double jeopardy clause.

30. The State argues that this case is closer to *DiFrancesco* than *Bullington*. It presents a novel rule it has extracted from *Bullington*—that only where there is an expectation of finality is *Bullington* applicable. The State would claim that Bullard had no expectation of finality because the judge had initially erroneously

found the facts against him. If the State's theory were adopted, *Burks*, where there was insufficient evidence as determined by the *appellate* court, would not be the law today, as no defendant who suffered an erroneous conviction could expect finality. *Burks*, however, tells us that a finding of insufficient evidence leads to the implicit acquittal. The State had marshalled all its resources to prove a set of facts and it had failed. Under no possible rule to be gleaned from *Bullington* could a second hearing be warranted. Under the State's theory, an erroneous decision of a judge later reversed by an appellate court would allow the State a second chance to do what it did not do before. We will not assume that any defendant was the person who committed prior felonies after a finding of insufficient evidence on that point; the question is rather, knowing that the evidence was insufficient to show that the defendant was the same person, may a second trial be held?

31. In both courts where the retroactivity of *Burks* has been analyzed, there has been a finding of retroactivity. *U.S. v. Bodey*, 607 F.2d 265 (9th Cir. 1979); *Ex Parte Reynolds*, 588 S.W.2d 900 (Tex.Cr.App.1979), *cert. denied*, 445 U.S. 920, 100 S.Ct. 1284, 63 L.Ed.2d 605(1980).

32. The exceptions were those such as stated in *Chicot County Drainage District v. Baxter State Board*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329(1940). For a complete discussion of the rationale for retroactivity, see Rossum, *New Rights and Old Wrongs: The Supreme Court and the Problem of Retroactivity*, 23 Emory L.J. 381 (1974).

33. The State, in its brief, alleged: "[t]he Court [in *Robinson*] continued to emphasize, however, the 'element of reliance embodied in the *Linkletter* analysis ...'," maintaining that that decision established a two pronged test which was concerned with good faith reliance and prejudice. As has been pointed out to the State by the Texas Court of Criminal Appeals, its position may misread *Robinson*.

> The State in its brief takes the position that *Robinson* in effect established a retroactivity test for double jeopardy holdings that looks only to the last two prongs of the three prong test of *Linkletter*. We believe that position misreads *Robinson*. Instead of emphasizing the "reliance" prong of *Linkletter*, *Robinson* simply stated, "The element of reliance embodied in the *Linkletter* analysis *will not be wholly absent* in the case of constitu-

> tional decisions not related to rial procedure ..." (Emphasis added). We construe this phrasing to indicate that the reliance component, while not wholly absent, will be of lessor significance in the double jeopardy area.

Ex Parte Reynolds, 588 S.W.2d 900, 903 (Tex.Crim.App.1979). Far from reliance being "emphasized" as the State would have us believe, the emphasis on reliance is a questionable consideration in this non-procedural area. In fact, the Court in *Robinson* stated,

> We intimate no view as to what weight should be accorded to reliance by the State that was justifiable under the *Linkletter* test in determining retroactivity of a non-procedural constitutional decision such as *Waller*.

34. The State claims that because the second hearing has been held, there is no reason to make the rules of *Burks* and *Bullington* retroactive. We disagree. While one purpose of the double jeopardy clause is to prevent a second trial, *Robinson*, 409 U.S. at 509, 93 S.Ct. at 878, it has, as another purpose, protection of the integrity of an acquittal. *Double Jeopardy Theory, supra* at 84. If defendant may suffer the sentence even though having been acquitted, this integrity would be greatly diminished. As such, the rules of *Burks* and *Bullington* must be retroactive to fulfill the purpose of the double jeopardy clause. *See Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975) (holding that even though second trial has been held, petitioner was entitled to habeas relief). As the court below so succinctly stated, to refuse to provide relief against the result of a second trial merely because the trial itself cannot be erased would be to turn the double jeopardy clause on its head.

35. The State complains in its brief that:

> Second, there are many reasons why there might have been additional evidence that could have been introduced at Bullard's trial—even at the punishment phase—but that was excluded for a variety of reasons ... Or Bullard might have been reindicted and retried as a habitual offender with *different* prior convictions alleged for enhancement. It is worth noting that there are numerous reasons why the State during the second prosecution might adduce constitutionally sufficient evidence after failing to do so during the first. Of some importance is the possibility that the passage of time might produce additional evidence.

The fact that the State made those tactical decisions cannot be justification for abrogation of the double jeopardy clause. "Legal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight." *Sanabria v. United States*, 437 U.S. at 65, 98 S.Ct. at 2179. If we were dealing here with acquittal on a substantive charge, the State would not argue that the double jeopardy clause should be abrogated because sufficient evidence, missing during the first trial, might be adduced at a second—i.e., that the State should be allowed to prosecute until it gets its case right. Yet that is what the State argues here. We find the argument unpersuasive. Because the concept of acquittal applies to this fact finding trial on the question of enhancement to life, the protection of acquittal also is applicable.

Finally, the State further alleges that Bullard *had* to undergo a second punishment hearing after the ruling of insufficiency to determine "a valid punishment." The State offers no authority for this position. As the district court stated, while enhancement to life is not possible, the State does have one valid prior conviction to use for enhancement, see note 2, *supra*, and a sentence based on this prior conviction may, under Texas law be possible without any new factual hearing. In any event, this is a question to be decided, in the first instance, by the Texas courts.

36. This court, in *Webster v. Estelle*, 505 F.2d 926 (5th Cir. 1974), stated, in dicta, that "[w]here enhancement could have been based on other convictions, reliance on an invalid one is harmless." 505F.2d at 931. Because failure to prove the facts of prior convictions has now, after *Bullington*, implicated the double jeopardy clause, unalleged, unproved convictions cannot substitute for those where facts are not sufficient. Reliance on an invalid conviction can no longer be considered harmless. *See Ex Parte Martin*, _____S.W.2d_____ (Tex.Cr.App. 1981) (holding where one of two convictions, the basis for enhancement to life, was invalid, the defendant could only be resentenced under § 12.42(a) which provided for enhancement where there was one prior conviction).

37. The district court ordered that Bullard should be discharged from custody unless retried or resentenced, as the state law requires, within ninety days. See note 36, *supra*.

Joint Appendix

Office-Supreme Court, U.S.
FILED
AUG 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1774

* * *

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1982

* * *

W.J. ESTELLE, JR.,

Petitioner,

V.

CHARLES EDWIN BULLARD,

Respondent.

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

JOINT APPENDIX

* * *

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PETITION FOR CERTIORARI FILED MARCH 23, 1982
CERTIORARI GRANTED JUNE 14, 1982

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RELEVANT DOCKET ENTRIES

April 17, 1978—Petition for Writ of Habeas Corpus, filed.

August 16, 1978—Respondent's Answer, Motion to Dismiss, Brief in Support, and State Court Papers, filed.

March 31, 1980—Findings, Conclusions and Recommendation of the United States Magistrate, filed.

April 14, 1980—Respondent's Objections to Magistrate's Findings and Conclusions, filed.

August 27, 1980—Memorandum Order and Judgment of District Court, filed.

September 12, 1980—Repondent's Motion for New Trial and Brief in Support, filed.

September 26, 1980—Memorandum Order of District Court, filed.

October 27, 1980—Respondent's Notice of Appeal, Motion for Stay of Judgment and Brief in Support, filed.

November 4, 1980—District Court's Order Granting Stay Pending Appeal, filed.

March 31, 1981—Petitioner's Motion for Release Pending Appeal, filed.

April 6, 1981—Respondent's Objections to Petitioner's Motion for Release, filed.

April 27, 1981—District Court's Order Denying Petitioner's Motion for Release, filed.

January 20, 1982--Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, filed.

February 2, 1982—Appellant's Motion for Stay of Mandate, filed.

February 8, 1982—Appellee's Reply to Appellant's Motion for Stay of Mandate, filed.

February 16, 1982—Order of the United States Court of Appeals Denying Appellant's Motion for Stay of Mandate, filed.

May 13, 1982—Respondent's Motion for Enlargement of Time in Which to Resentence or Release Petitioner, Motion for Expedited Consideration, and Brief in Support, filed in District Court.

May 13, 1982—District Court's Order Granting Respondent's Motion for Expedited Consideration and Motion for Enlargement of Time in Which to Resentence or Release Petitioner, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS DIVISION

* * *

PETITION FOR WRIT OF HABEAS CORPUS
BY PERSON IN STATE CUSTODY

* * *

CHARLES EDWIN BULLARD #251991

Full name and prison number (if any) of Petitioner

VS.

W.J. ESTELLE, JR., Director
Texas Department of Corrections

Name of Respondent

Wynne Unit, Texas Dept. of Corrections,
Huntsville, Tx.

Place of confinement

CA3-78-0442-G

Case No. (To be supplied by the Clerk of the District Court)

U.S. District Court
Northern District of Texas
FILED
APR 17 1978
JOSEPH McELROY, JR., CLERK
BY:_____

(Instructions for filing petition omitted)

PETITION

1. Name and location of court which entered the judgment of conviction under attack: **the 195th Judicial Dist. Court of Dallas County, Texas.**

2. Date of judgment of conviction: **April 15, 1975**

3. Length of sentence: **Life**
   Sentencing judge: **Hon R.T. Scales**

4. Nature of offense or offenses for which you were convicted: **Felony theft, enhanced by two prior convictions under Section 12.42(d), V.A.P.C.**

5. What was your plea? **Not guilty**

6. Kind of trial: **Jury**

7. Did you testify at the trial? **No**

8. Did you appeal from the judgment of conviction? **Yes**

9. If you did appeal, answer the following:
   (a) Name of court: **Court of Criminal Appeals, Austin, Texas**
   (b) Result: **affirmed on guilt, remanded on punishment**
   (c) Date of result: **March 3, 1976.**

10. Other than direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? **Yes**

11. If your answer to 10 was "yes", give the following information:
    (a) (1) Name of court: **195th Judicial District Court of Dallas County, Texas.**

(2) Nature of proceeding: **Application for Writ of Habeas Corpus.**

(3) Grounds raised: **Ineffective Assistance of Counsel; Fatally Defective Indictment; Void Prior Convictions; Prejudicial Comments on the Part of the Prosecutor; Denied Proper Jury Charge as to Circumstances, Evidence, Void of Evidence; Denial of Jury Trial on Rehearing; Cruel and Unusual Punishment; and Compelled Defendant to Give Evidence Against Himself.**

(4) Did you receive an evidentiary hearing on your petition, application or motion? **No**

(5) Result: **Denied without written order.**

(6) Date of result: **September 14, 1977.**

(b) As to any second petition, application or motion give the same information:

(1) Name of court: **195th Judicial Dist. Court, Dal. Co., Tx.**

(2) Nature of proceeding: **Application for Writ of Habeas Corpus.**

(3) Grounds raised: **DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW WHEN THE STATE PROSECUTOR DECIDED TO SEEK A "RE INDICTMENT" AS A HABITUAL CRIMINAL.**

(4) Did you receive an evidentiary hearing on your petition, application or motion? **No**

(5) Result: **DENIED WITHOUT A WRITTEN ORDER.**

(6) Date of result: **OCTOBER 21, 1977.**

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: **COURT OF CRIM. APPEALS, AUSTIN, TEXAS.**

(2) Nature of proceeding: **MOTION FOR RECONSIDERATION.**

(3) Grounds raised: **REQUEST THAT THE**

COURT OF CRIMINAL APPEALS CONSIDER AND RENDER A WRITTEN DECISION ON PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS.

(4) Did you receive an evidentiary hearing on your petition, application or motion? **No**
(5) Result: **DENIED.**
(6) Date of result: **FEBRUARY 8, 1978.**

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

(caution statement omitted)

A. Ground one: **THE STATE PROSECUTOR ARBITRARILY SOUGHT REINDICTMENT AS A HABITUAL CRIMINAL IN VINDICTIVE RETALIATION.**

Supporting FACTS (tell your story *briefly* without citing cases or law):

On the 23rd day of December, 1974, petitioner was indicted by the Grand Jury of Dallas County in Cause #74-1198-HN. During the month of February, 1975, at the first pre-trial conference with the State's prosecutor and court appointed counsel, the petitioner properly exercised his right to plead not guilty and requested a trial by jury. Petitioner then declined to accept an eight-year sentence in exchange for a guilty plea. The prosecutor then warned the petitioner that if he did not plead guilty, he would be reindicted under the Habitual Criminal Statute. Petitioner declined to plead guilty and asked to go to trial on the offense of "Burglary of a Habitation", as shown in the in-

dictment. After petitioner asserted his right to a jury trial in this instant case, the prosecutor returned to the Dallas County Grand Jury and sought reindictment, habitual. The Grand Jury subsequently reindicted petitioner on March 31, 1975 in Cause No. F-75-3528-JN for the offense of THEFT—HABITUAL—REINDICTMENT.

B. Ground two: **THE STATE PROSECUTOR MADE PREJUDICIAL COMMENTS ON PETITIONER'S FAILURE TO TESTIFY.**

Supporting FACTS (tell your story *briefly* without citing cases or laws):

Contained within the *Statement of Facts,* page 74, line 3-6, the prosecutor did state the following: "....Any time a witness takes the stand, their...any type of criminal record involving felonies or misdemeanors that involve moral turpitude can be brought to you so you can judge their creditability." The prosecutor followed that statement with the following contained on page 78, line 19-25 and on page 79, line 1-5, Supra:"...Mr. Carr said we have no proof of the intent of Edward Bullard (sic). Well, he's asking me to do something that's impossible to do. We can't crack open somebodys head like a coconut and pull out a slip of paper and have on there what his intent was, so the law provides for this, which allows us to prove to you someones intent by the acts they have done or the words they speak; acts done, words spoken. No one has any words of Charles Bullard, but we can show you the acts that he performed in that time in question. What actions did he take that would indicate to you that he knew what was going on?"

C. Ground three: **THAT THIS INSTANT CASE AND CONVICTION IS VOID OF EVIDENCE AS TO THE CRUCIAL AVERMENTS OF THE INDICTMENT.**

Supporting FACTS (tell your story *briefly* without citing cases or law):

The record of the trial court will show that the petitioner was accused and indicted on the offense against the State of Texas of "Theft-Habitual-Reindictment". A review of the record comporting to constitutional standards will show that the State failed to prove no more than possession of the alleged stolen property, but failed to show as the possessor or knowledge, intent or theft or other crucial averments of the indictment, insufficient to sustain the conviction of the Petitioner.

D. Ground four: **THAT THE TRIAL COURT ERRED WHEN THE COURT DENIED PETITIONER A JURY TRIAL AT HIS PUNISHMENT REHEARING.**

Supporting FACTS (tell your story *briefly* without citing cases or law):

In Bullard v. State, 533 S.W.2d 812 (Tex. Cr. App. 1976), the conviction for felony theft was affirmed. Life imprisonment was assessed as punishment under the provisions of V.T.C.A. Penal Code 12.42(d). Although the conviction was affirmed, the cause was remanded for a new penalty hearing since one of the two prior convictions alleged for enhancement was not properly proven though utilized by the trial court in assessing punishment. At the new penalty hearing, the trial court found the

allegations in the indictment as to the prior convictions to be "true" and again assessed Life imprisonment as punishment. Petitioner contends that the trial court erred in denying Petitioner a jury trial at the new penalty hearing following remand. Prior to such penalty hearing, the Petitioner filed a motion requesting the withdrawal of his election under Art. 37.07, V.A.C.C.P., to have the judge assess punishment made at the original trial and requested the same jury at the guilt stage of the trial be empaneled to pass on punishment, or in the alternative, that a new jury be empaneled for the purpose of the penalty hearing. The motion was overruled. Petitioner contends that there were fact issues to be determined; that is, the truth of the allegations as to the prior convictions alleged for the enhancement of punishment, and under the constitutional and statutory provisions of this state, he was entitled to a jury trial following remand.

E. Ground five: **THAT PETITIONER WAS TWICE PUT IN JEOPARDY WHEN THE COURT OF CRIMINAL APPEALS REMANDED PETITION FOR RESENTENCING.**

Supporting FACTS (tell story *briefly* without citing cases or law):

Petitioner alleges that he was twice put in jeopardy when the Court of Criminal Appeals remanded Petitioner to the trial court for a new hearing on the issue of punishment, at which time the state was allowed another opportunity to prove the prior convictions for the purpose of enhancing punishment, in violation of the Fifth Amendment of the United States Constitution.

F.Ground six: **THAT THE CONVICTION AND LIFE SENTENCE OPERATES TO BECOME CRUEL AND UNUSUAL PUNISHMENT DUE TO EXCESSIVE PUNISHMENT.**

Supporting FACTS (tell your story *briefly* without citing cases or law):

In support of the above ground, Petitioner would show that in this instant case, F-75-3528-JN, Petitioner was convicted for the offense of felony theft; the punishment, enhanced by proof of two prior felony convictions under the provisions of V.T.C.A. Penal Code 12.42(d), is imprisonment for Life. The items alleged to have been stolen were a 21-inch black and white portable television set, two or three months old, and a President component stereo system, which was six or seven months old. Prior to that, Petitioner was convicted of Attempting to pass a forged instrument knowing the same to have been forged. The check was for the amount of $47.24. Prior to that, Petitioner was convicted for the offense of Burglary. He was accused of entering an *unoccupied and uninhabited* apartment, taking a second-hand refrigerator. Petitioner will offer that it was not the intent of the Texas Legislature to protect Society and isolate an individual who has committed three wholly, nonviolent crimes that were dissimilar in pattern and elements and involving amounts that might be considered petty crimes or even misdemeanor, with the true value firmly established. The mandatory Life sentence is so disproportionate to the seriousness of the underlying offenses and so grossly excessive that it amounts to Cruel and Unusual Punish-

ment forbidden by the Eighth Amendment to the United States Constitution.

13. If any of the grounds listed in 12A, B, C, D, E and F were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: (blank)

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? **No**

15. Give the name and address, if known, of each attorney who represented you in the follwing stages of the judgment attacked herein:
    (a) At preliminary hearing: **none**
    (b) At arraignment and plea: **Mr. Timothy M. Carr, 3121 N. Fitzburgh, Dallas, Texas 75204**
    (c) At trial: **Mr. Timothy Carr**
    (d) At sentencing: **Mr. Timothy M. Carr**
    On resentencing after remand - Mr. Pat McDowell (address below)
    (e) On appeal: **Mr. Pat McDowell, 810 Main St., Dallas, TX. 75202**
    (f) In any post-conviction proceeding: **none**

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? **Yes - Habitual Enhancement**

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? **No**
    A. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your petition is attacking was entered? **Yes**

b. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. **Inmates Thomas Preston and Elliott Wayne White assisted me in this and other petitions in state court, up to the time of their release from the TDC on parole. Preston was released in February of 1978 and White was released on April 6, 1978.**

c. Describe the nature of the assistance, including the names of those who rendered it to you. **Legal research and typing of petitions.**

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Executed at **HUNTSVILLE, WALKER COUNTY, TEXAS**

Wherefore, I, **CHARLES EDWIN BULLARD**

declare (or certify, verify, or state) under penalty or perjury that I have read the foregoing and it is true and correct. (28 U.S.C. 1746).

Executed on the _____ day of April, 1978.

/s/ Charles E. Bullard

Signature of Petitioner

Charles Edwin Bullard
T.D.C. No. 251991
Rt. 1, Box 1, Wynne B2
Huntsville, Texas 77340

AFFIDVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, **Charles Edwin Bullard,** declare, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further declare that the responses which I have made to questions and instructions below are true.

1. Are you presently employed: **No**

(question a omitted - does not apply)

b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.
December of 1969 - $400 per month

2. Have you received within the past twelve months any money from any of the following sources?
a. Business, profession or form of self-employment? **No**
b. Rent payments, interest or dividends? **No**
c. Pensions, annuities or life insurance payments? **No**
d. Gifts or inheritances? **No**
e. Any other sources? **No**

(question omitted - does not apply)

3. Do you own cash, or do you have money in a checking or savings account? (Include any funds in prison accounts.) **Yes**
If the answer is "yes", state the total value of the items owned. **$1.00 in my prison account.**

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? **No**

(question omitted - does not apply)

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. **None**

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury. I declare (or certify, verify, or state) under penalty or perjury that the foregoing is true and correct. (28 U.S.C. 1746).

Executed on the _____ day of April, 1978.

/s/ Charles E. Bullard

Signature of Petitioner
Charles Edwin Bullard

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $1.00 on account to his credit at the Wynne Unit, T.D.C. as of April 4, 1978 institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said institution: None

/s/ William F. Rojillio

Authorized officer of Institution

MEMORANDUM ORDER OF DISTRICT COURT

(*See,* Petition for Writ of Certiorari at A-2)

JUDGMENT OF DISTRICT COURT

(*See,* Petition for Writ of Certiorari at A-1)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Charles Edwin Bullard, *Petitioner*	§	
V.	§	**Cause No. CA-3-78-0442-G**
W.J. Estelle, Jr., *Respondent*	§	

MOTION FOR NEW TRIAL
AND BRIEF IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES W.J. Estelle, Jr. Respondent herein, by and through his attorney, the Attorney General of Texas, and pursuant to Rule 59, Federal Rules of Civil Procedure, makes this his motion for new trial and submits his affidavits and brief in support thereof:

I.

On August 27, 1980, this Court entered a Memorandum Order and Judgment granting Petititoner's application for writ of habeas corpus. The basis for the granting of the writ is that Petitioner's sentence of life imprisonment is in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution because his original life sentence as a habitual offender imposed pursuant to Tex. Penal Code Ann. §12.42(d), was reversed by the Texas Court of Criminal Appeals for insufficiency of the evidence to show that Petitioner was the same defendant convicted in one of the two prior convictions introduced in the punishment phase of his trial. *Bullard v. State,* 533 S.W.2d 812 (Tex.Crim.App. 1976). Following a remand

and the presentation of additional evidence at the punishment phase of trial, the Court of Criminal Appeals affirmed the conviction and sentence in *Bullard v. State,* 548 S.W.2d 13 (Tex.Crim.App. 1977), all in violation of the Constitution, according to this Court's prior order and judgment.

II.

Respondent has argued that the key to determining whether *Burks v. United States,* 437 U.S. 1 (1978), and *Greene v. Massey,* 437 U.S. 19 (1978) are retroactive is whether the State can show detrimental reliance in good faith upon the laws that existed prior to the decision in those cases. Apparently the Court does not disagree that any reliance was in good faith. Indeed, such a conclusion would be impossible in light of the numerous cases that the Supreme Court found it necessary to overrule to reach the result in *Burks* and *Greene.*

With respect to the prejudicial reliance contention, this Court held as follows:

> The Texas Court of Criminal Appeals correctly noted that the only possible source of prejudice, that the state might have foregone prosecution for other offenses in order to reprosecute on the original offense, is too speculative in nature to bar retroactivity. *Ex parte Reynolds, supra* at 904.

Memorandum and Order at 8-9.

Respondent denies that this possibility is "speculative in nature." Instead, it is a matter of common sense and general knowledge that there are fequently numerous charges pending against particular criminals, especially those threatened with habitual offender status. The offenses may be pending in the form of ac-

tual indictments, or in the form of offense reports that the prosecutor may cause to ripen into indictments, depending upon the outcome of the particular case he chooses to prosecute.

Nevertheless, in an abundance of caution, Respondent has obtained the affidavit of William Westmoreland, Chief, Appellate Section, Dallas County District Attorney's Office, and it is attached hereto. It states that as a matter of common practice in Dallas County and elsewhere district attorneys often prosecute to a conclusion only one of several possible pending cases against a defendant. The certified copies of the police offense reports, also attached hereto, show that Petitioner was arrested at least *five times* in Dallas County in 1974, including his arrest for the offense resulting in his sentence of life imprisonment, and that several of these arrests were for offenses that were felonies.

As stated in Westmoreland's affidavit, at least *two* of these arrests ripened into indictments that were dismissed only *after* the prosecution in the theft case had apparently ended in a sentence of life imprisonment. Clearly, after the evidence was insufficient at the punishment stage of Petitioner's first trial, there was other felony charges that might have been prosecuted by the Office of the District Attorney that would also have resulted in a mandatory sentence of life imprisonment, but the district attorney did not prosecute such offenses because he had no way of knowing that the reprosecution of the same offense at which the evidence was insufficient would be later held invalid because of new law established by the Supreme Court. In short, the State has detrimentally relied upon its good faith view of the law as it existed before *Burks* and *Greene* were decided. Such detrimental reliance is not speculative, but real. It would be unfair to penalize the State by holding *Burks* and *Greene* retroactive.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that this motion be granted; and that the application for writ of habeas corpus be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General

/s/ Douglas M. Becker

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Captiol Station
Austin, Texas 78711
(512) 475-3281
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Douglas M. Becker, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Motion for New Trial has been served by placing same in the United States Mail, postage prepaid, certified, return receipt requested, on this the 8th day of September, 1980, addressed as follows: Mr. Charles Edwin Bullard, TDC #251991, Wynne Unit, Route 1, Box 1, Huntsville, Texas 77340.

/s/ Douglas M. Becker

DOUGLAS M. BECKER
Assistant Attorney General

POLICE DEPARTMENT
CITY OF DALLAS

DISPOSITION

Date: 9/16/74
Court: CCC 3
Docket: 74-3476-C
Method: Plea
Disposition: 5 days jail

PROSECUTION REPORT

Impact Case: NO
Rep. Offender: NO
Regular Filing: YES

APPROVED FOR FILING

/s/ H.Williams

Supervisor

FILING INFORMATION

Date Filed: 9/9/74
With:
By:

W.E. ROBBINS #1391

Investigating Officers

D.O. RODRIGUEZ #2776

Arresting Officers

CITY JAIL

Defendant: Bullard, Charles Edwin
Race: Black Age: 42 D.O.B. 11/18/31
Residence: 1719 McBroom
Date and Time of Arrest: 5/15 pm 9/8/74
Identification No.: unknown
Place of Arrest: 6800 Forest Park Road
Arrest No. 74/57252
Date and Time of Offense: 5:00 pm 9/8/74
Complainant: LONG MILE RUBBER COMPANY
6820 Forest Park Road 351-3284
Robert Ragsdale, w/m/35 (Asst. Mgr.)
5612 Sundown Lane 271-2840
Where and How Committed: 6800 Forest Park Road — cut chain on spare tire on trailer & was arrested.
Charge: THEFT (ATTEMPT) SECTION 31.03 CLASS B MISDEMEANOR
Property Taken and Value: NO LOSS....CAUGHT IN THE ACT ATTEMPTING TO STEAL SPARE TIRE VALUED AT $110.00
List Evidence and Seizures: 1 chain; 1 pair bolt cutters in CSS on PES #32923 testimony of officers
Attachments: Arraignment
Accomplices: Earnest Walker, Jr. b/m/29
D.O.B.: 7/29/35
Jessie Smith, Jr. b/m/38 DOB: 11/3/35
Summary of Case: Officer Rodriguez was working alone, driving down Hawes Street & observed these 3 men scurrying to their parked vehicle. The vehicle was parked within about 4' to 6' of the trailer & adjacent to it. It was apparent that the men had been at the trailer & had seen the officer approaching & had attempted to flee. Rodriguez passed on by pretending not to notice the men, but they started the car & attempted to drive away. Rodriguez returned & they were there. Officers Smith & Gullion were also summoned to the scene to assist Rodriguez with the prisoners. Smith was told by Rodriguez that it had appeared as if one of the occupants had stuffed something under the

right front seat of the car and Smith searched that area & found a pair of bolt cutters under the seat. The bolt cutters appeared to have been recently used.The chain holding the spare tire on this trailer was inspected & it was found to appear to have been freshly cut by bolt cutters. All 3 men were Jailed and the Crime Scene Search Unit was called to the scene to take charge of the bolt cutters & the cut chain. These items were put in the Crime Laboratory under P.E.S. tag #32923 for inspection. That report is not available at this writing. The complainant was called to the scene to secure his spare tire.

COMPLAINANT:	TESTIMONY
Long Mile Rubber Co. 6820 Forest Park Rd. 351/3284 Robert Ragsdale w/m/35 5612 Sundown Lane 271/2840	Will testify he is the Assistant Manager of this business; that the tire was worth about $100.00; that the defendant did not have permission to steal the tire or cut the chain.

ARRESTING OFFICERS:

D.O. Rodriguez #2776 Dallas PD Radio Patrol Division 748/9711 Ext. 1476	Will testify that he observed these 3 men hurridly getting into the parked 1968 Oldsmobile adjacent to the trailer; that it appeared that they were fleeing due to his presence; that he arrested the 3 men & called for assistance of other officers; that Officer Smith found the bolt cutters under the seat of the men's car; that the bolt cutters & the spare tire chain were placed in

Police Lab on P.E.S. Tag #32923; that the defendants were jailed & the car placed in the Pound.

ASSISTING OFFICERS:

C.C. Smith #2939
Dallas P.D.
Radio Patrol Division
748/9711 Ext. 1476

Will testify he was called to the scene & assisted Officer Rodriguez with this matter; that he found the bolt cutters under the right front seat of the 1968 Oldsmobile.

INVESTIGATING OFFICER:

W.E. Robbins #1391
Dallas P.D.
Crimes Against
Property Section
748/9711 Ext. 561

Will testify that he took the defendant before Judge George Orndoff of the Corporation Court at 9:36 AM on 9/9/74 to be advised of his rights and to have Bond Set; that he prepared this case report for prosecution.

PREVIOUS RECORD:

None (defendants admits to be 3XTSP) Record Check: Waters

POLICE DEPARTMENT
CITY OF DALLAS

DISPOSITION

Date: 7-26-74
Court: CCC
Docket: 74-3523

Method: Plea
Disposition: 10 das

PROSECUTION REPORT

Impact Case: No

Rep. Offender: Yes
G.J. Referral: No
Preliminary: No
Supplement: No

FILING INFORMATION

Date Filed: JUL 18 1974
With: Brotherton
By: DA Unit
Investigating Officer: W.E. Robbins #1391
Arresting Officers: H.J. Quiroz #2971
W.A. Johnson #2842
Location of Defendant: City Jail

APPROVED FOR FILING

/s/ Sgt. L.D. Miller

Supervisor

Defendant: Bullard, Charles Edwin
Race: N Age: 42 Sex M
D.O.B.: 11/18/31 Residence: 1719 McBroom
Date and Time of Arrest: 7/17/74 1:42 am
Identification No. 36468
Place of Arrest: 4200 N. Westmoreland
Arrest No.: 74/45285
Date and Time of Offense: 11 pm to 1:15 am July 16-17, 1974
Complainant: Chief Freight Lines 3818 Irving Blvd., 631-7140 (Ray Valente, Supervisor)

Where and How committed: 3818 Irving Blvd.
Charge: THEFT, VIOLATION SECTION 31-03, CLASS A MISDEMEANOR
Property Taken and Value: 1 Goodyear 10x20 truck tire & wheel, valued at $100.00
List Evidence and Seizures: above tire & wheel on tag #158171
Attachments: Arraignment sheet, Transcript Offense & Arrest
Accomplices: Earnest Walker Jr.
Race: N Age: 38
Sex: M D.O.B.: 7/29/35
Summary of Case: The arresting officers saw a large truck tire in the trunk of the car driven by Chas. E. Bullard. The late hour gave them reason to stop the vehicle & check the tire which was exposed in the trunk. This tire had "Chief Freight Lines #10590" stamped on it. The two then were arrested & jailed. The recovered property was placed in the police property room on Tag #158171 by officer W.A. Craven #2420. Officer Craven had also gone by the complainant's business location & contacted John Dean to establish that a theft had actually occurred. Det. Robbins called Ray Valenta the following day & found that this tire had been seen last on 7/11/74 in the spare tire rack at Chief Freight Lines.

COMPLAINANT:

Chief Freight Lines 3818 Irving Blvd. 631-7114 Ray Valenta wm47 1718 N. Bristol Irving 255-6582	Will testify that he is a supervisor for this company and that the defendants did not have permission to have possession of this tire; he can positively identify this tire was taken from his yard Holster on 7/11/74 and being placed in the spare tire rack inside the building

upon his direction and was still supposed to be there at this time; that these accomplices could have only stolen the tire from that rack.

WITNESS:

John Dean WM31
5713 Highland
Ft. Worth, Tex.
834-7950
Chief Freight Lines
3818 Irving Blvd.
631-7114

Will testify that he was on duty on 7/17/74 at approximately 2 am when officer WA Craven came to his place of business with the recovered tire and this witness identified the tire as property of the company.

WITNESS:

W.A. Craven 2420
Radio Patrol Division
748-9711 Ext. 1476

Will testify that he went to the scene of the arrest and assisted the arresting officers by taking the recovered tire and showing it to John Dean and then placing the tire in the property room on tag #158171.

ARRESTING OFFICERS:

H.J. Quiroz 2971
W.A. Johnson 2842
Radio Patrol Division
748-9711 Ext. 1476

Will testify that they observed a 69 Mercury NBT 987 being driven by Charles Edwin Bullard and occupied by Earnest Walker Jr., in the 4200 blk of N. Westmoreland and that a large truck tire was protuding from the trunk of the car; that they stopped the

two men to check on the tire and found that the tire was stamped "Chief 10590" and arrested the two defendants; that they called officer Craven to the scene and asked him to take the tire to the comp. for identification and also to place this tire in the property room; that they jailed the defendants.

INVESTIGATING OFFICERS

W.E. Robbins 1391 Crimes Against Property Section 748-9711 Ext. 561	Will testify that he took the defendant before Judge George Orndoff of the Municipal Court at 11:11 AM on 7/17/74 to be advised of his rights and to have bond set. ($3,000.00); that he prepared this case report for filing.

POLICE DEPARTMENT
CITY OF DALLAS

DISPOSITION

Date: 9-3-75
Court: 194th
Docket: C74-10067 M
Disposition: Dismissed

PROSECUTION REPORT

Impact Case: No
Rep. Offender: Yes
Regular Filing: No
Preliminary: Yes

FILING INFORMATION

Date Filed: 10/10/74
With: Brotherton
By: J.H. Gardner to Walk Oct. 10, 1974
Investigating Officers: J.H. Gardner #1579
Arresting Officers: At Large
Location of Defendant: At Large

APPROVED FOR FILING
/S/ Sgt. M.D. Jennings

Supervisor

Defendant: Bullard, Charles Edwin
Race: Black Age: 42 Sex: M
D.O.B.: 11/18/31 Residence: 1719 McBroom
Date and Time of Arrest: at large
Identification No.: 36468
Place of Arrest: at large
Date and Time of Offense: 9/30/74 1:00 am
Complainant: Ronald Cardoza, w/m/35 (Res: 747 Douglas Dr. San Leandro, California) Res. Ph: 568-2404 Insured Transporters: 1944 Williams St., San Leandro, California. 483-9790
Where and How Committed: 4900 block Chief ---broke into truck, took property.
Charge: BURGLARY OF VEHICLE SECTION 30.04 THIRD DEGREE FELONY
Poperty Taken and Value: 1 cobra radio $220.00; 2 antennas $79.90; 2 firestone 1000x22 Tires $300.00; 2 General Tires: 1000x20 $300.00 TOTAL: $899.90

List Evidence and Seizures: Witness identified defendant's prints
Attachments: Other offense, transcipts
Accomplices: Unknown
Summary of Case: This defendant's prints were compared to those found on a steel band at scene and identified as the same.

COMPLAINT:	TESTIMONY:
Ronald Cardoza w/m/35 7474 Douglas Dr. San Leandro, Cal. 568/2404 AC:415 1944 Williams St. San Leandro, Cal. 483/9790	Will testify he was driver of the vehicle. That same was burglarized and it was in his care, custody and control and that he gave no one permission to enter it & remove the property.

WITNESS:

E.R. Rhodes #2584 Dallas Police Dept. 748/9711 Ext. 525	Will testify he went to scene of offense at time it was reported. That he dusted for fingerprints on a steel band that had been handled by suspect. That he did obtain a print from this band. Further, that at investigation officer's request, he compared that print with those of this defendant and that he did identify them as the same.

INVESTIGATING OFFICERS:

J.H. Gardner #1579 Crimes Against Property Section	Will testify that he investigated this offense; That he requested the comparison

748/9711 Ext. 561 — of the prints. That he caused this case to be filed.

Previous Record:

See Attached — Record Check Per Allen

DEF. PRIOR RECORD 10/4/56 2 yrs. TDC from Dallas Theft O Df got 6 yrs. TDC 7/16/70 from Dallas for Burg. 12/9/59 got 2 yrs. Federal Seagoville from Dallas Poss. US gout cks unlawfully.
6/20/62 Rec. 2 yrs. from Dallas in TDC att poss forged Inst.

10/10/74 3:10 PM meb

POLICE DEPARTMENT
CITY OF DALLAS

Disposition

Date: 4/14/75
Court: 195th
Docket: C 74-11598N
Disposition: Dismissed

Prosecution Report

Impact Case: Yes
Rep. Offender: Yes
Regular filing: Yes
Preliminary: No
Supplement: No
G.F. Referral: No

Filing Information

Date Filed: 11/20/74
With: Brotherton
By: D.A.'s Unit
Investigating Officer's: N.W. Crawford #2456
R.D. Lewis #3104
Arresting officers: N/A
Location of Defendant: County Jail

APPROVED FOR FILING

/s/ Sgt. EE. Hardy 1863

Supervisor

Defendant: Bullard, Charles Edwin
Race: Black Age: 43 D.O.B.: 11/18/31
Residence: 1719 McBroom
Date and Time of Arrest: N/A
Identification No.: 36468
Place of Arrest: N/A Arrest No.: N/A
Date and Time of Offense: October 10, 1974, 6:45am - 6:30pm
Complainant: Harrison, Mary Ellen, 1331 Renner, 942-1946 247-7175
Where and How committed: 1331 Renner St.-pried open front door & removed property
Charge: BURGLARY 30.02 (HABITATION) FELONY FIRST—FIFTH FELONY OFFENSE.
Property Taken and Value: (1) Sears Console TV, TX#1352458; (1) GE portable radio; (1) Kingston sewing machine; valued at $157.00
List Evidence and Seizures: One Sears Console TV, TX#1352458 and eyewitness testimony from officers. Property recovered from 5207 Parkland Ave. in DPD Property Room Tag #162491
Attachments: Transcript Offense Report

Accomplices:
Doris Nell Jennings Race: B Age: 34
D.O.B.: 9/10/40
Ernest Walker, Jr. Race: B Age: 39
D.O.B.: 7/29/35
Velma Marie Powell Race: B Age: 34
D.O.B.: 8/5/40

Summary of Case: On October 10, 1974, officers received information of a Jose Ibarra buying stolen merchandise at 2222 Irving Blvd. Officers set up surveillance at that location and observed the defendant and accomplices sell to Jose Ybarra the above recovered stolen property. This transaction took place the same day of the burglary and at 5:30 PM. On confrontation with the defendant, she stated he was not at the location on Irving Blvd. that day and didn't know what officers were referring to.

COMPLAINT:

Mary Ellen Harrison 1331 Renner St. 942-1946 22 Northtown Mall 247-7175	Can testify that she did not give anyone permission to enter her residence or to remove any property from her residence.

WITNESSING OFFICERS:

E.E. Hardy #1863 G.D. Womack #3219 Dallas Police Dept. 748-9711/Ext. 1525	Can testify that both officers know the defendant and accomplices and observed the defendant and accomplices in possession of the stolen property and sell it to a subject who has given officer a written statement admitting buying stolen property on several occasions.

INVESTIGATING OFFICERS:

N.W. Crawford #2456 R.D. Lewis #3104 Dallas Police Dept. 748-9711/Ext. 1525 748-9711/Ext. 1525	Can testify they contacted complainant and identified the property with Tx #135458. That they reviwed the offense for filing and filed offense.
Previous Arrest.	Transcript attached

POLICE DEPARTMENT
CITY OF DALLAS

Disposition

Date: 9/18/75
Court: 195th
Docket: C 74-11599N
Method: JT
Disposition: 2 yrs TDC

Prosecution Report

Impact Case: Yes
Rep. Offender: Yes
Regular Filing: Yes
Preliminary: No
Supplement: No
G.F. Referral: No

Filing Information

Date Filed: 11/20/74
With: Brotherton
By: D.A.'s Unit
Investigating officers: N.W. Crawford #2406
R.D. Lewis #3104
Location of Defendant: County Jail

APPROVED FOR FILING

/s/ Sgt. EE. Hardy 1863
Supervisor

Defendant: Bullard, Charles Edwin
Race: Black Age: 43 Sex: M
D.O.B.: 11-18-31 Residence: 1719 McBroom
Date and Time of Arrest: (blank)
Identification No.: 36468
Place of Arrest: N/A Arrest No.: N/A
Date and Time of Offense: October 4, 1974, 3PM-6PM
Complainant: James Edgar Thomas, 3535 Jane St., 638-8973; Bus. 749-8231
Where and How committed: 3535 Jane St.-pried open rear door; entered & removed complainant's property
Charge: BURGLARY (SEC. 30.02) FIRST DEGREE FELONY—FIFTH FELONY OFFENSE
Property Taken and Value: "GE" Black & White TV, "President" Stereo Component set, Total value $350.00
List Evidence and Seizures: Above stolen property-located at Property Room Tag #160504
Attachments: Transcript Offense Report
Accomplices:
Earnest Walker, Jr. Race: B Age: 39 Sex: M
DOB: 7-29-35
Jose Ibarra Race: L Age: 43 Sex: M
D.O.B.:4-16-31
Summary of Case: On October 10, 1974, Officers received information from an informant that the accomplice Jose Ibarra was buying stolen property from several known offenders including the defendant and accomplice Walker. Officers were set up on surveillance at 2222 Irving Blvd. when the defendant and accomplice Walker drove up in a 1967 Plymouth, gold in color. This defendant and accomplice Walker

spoke to the accomplice Ibarra for a few minutes and then left. Approximately thirty minutes later, these suspects returned with a Sears Silvertone Console Television in the trunk of the vehicle. Both subjects went into the location at 2222 Irving Blvd. and talked with Ibarra. Ibarra purchased the televisions and took it to another location. Officers later went to the residence of Ibarra and he gave officers information on the location of property at his residence and at 4906 Maple. Accomplice Ibarra stated he purchased most of the property from the defendant and accomplice Walker. Ibarra showed officers where the complainant's property was and stated he purchased it from the defendant and accomplice on the same day of the offense at approximately 6PM.

Complainant:

James Edgar Thomas 3535 Jane Street 638-8973/749-8231 School Bus Driver	Can testify that he did not give the defendant permission to enter his residence and remove the property. That he identified his property for officers and filed an offense with the Dallas Police Department.

Witness:

Jose Ibarra 4906 Maple 279-1051/521-4770	Can testify to the facts in the case summary and that he gave officers a statement on the defendant which led to the recovery of the complainant's property.

Arresting & Investigating Officers:

R.D. Lewis #3104 N.W. Crawford #2456 G.D. Womack #3219 748-9711/Ext. 1525	Can testify to the facts in the case summary. That they arrested the defendant and reviewed the case for filing.
Previous Record:	Transcript attached.

CIVIL ACTION NO. 3-78-0442-G

Charles Edwin Bullard, *Petitioner*	§	**U.S. District Court**
VS.	§	**Northern District of Texas**
W.J. Estelle, Jr., *Petitioner*	§	**Dallas Division**

AFFIDAVIT

I am W.T. Westmoreland, Chief, Appellate Section, Dallas District Attorney's Office, a position I have held for ten years. It is common in this office and in other District Attorney's offices I have seen that there is often more than one charge pending against a criminal defendant, either by multiple indictments having been returned against the defendant, or by multiple indictments being possible. It is a common practice in this office and others to dismiss those other charges if one is prosecuted successfully.

In this case, our records show that there were three felony indictments pending against Bullard in Dallas County in 1975. In addition to the indictment for theft resulting in a life-sentence, there were pending indictments for burglary of a habitation and burglary of a vehicle, both felonies. These indictments were dismissed after the theft case was prosecuted to an apparently successful conclusion.

I declare under penalty of perjury that the above is true and correct.

SIGNED this 5th day of September, 1980.

/s/ W.T. Westmoreland, Chief

W.T. WESTMORELAND, CHIEF
Appellate Section
Dallas District Attorney's Office

MEMORANDUM ORDER OF DISTRICT COURT

(See, Petition for Writ of Certiorari at B-1)

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(*See,* Petition for Writ of Certiorari at C-1)

Opposition

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NO. 81-1774

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

W. J. ESTELLE, JR.,
Petitioner

V.

CHARLES EDWIN BULLARD,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH E. HOUP, JR.
FRANK MALONEY & ASSOCIATES, P.C.
505 West 12th Street, Suite 200
Austin, Texas 78701
(512)476-8700

Attorney for Respondent

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TO THE HONORABLE JUSTICES OF SAID COURT:

Comes now Charles Edwin Bullard, Respondent, by and through his Court-Appointed attorney, Kenneth E. Houp, Jr., and pursuant to a request by the Court, files this his brief in opposition to the State of Texas' Petition for Certiorari. As grounds for denying the writ, Respondent would adopt the opinion of the Court of Appeals below and show the Court the following:

STATEMENT OF THE CASE

In the interest of brevity, Respondent would adopt the Statement of the Case set out in Petitioner's brief.

SUMMARY OF THE ARGUMENT

The arguments now raised by Petitioner in this Court were previously raised in its original brief and post argument brief in the Fifth Circuit, and were correctly rejected by that Court in its opinion. Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982).

Futhermore, the EN BANC Texas Court of Criminal Appeals, since Petitioner's Petition for Certiorari was filed, expressly overruled many Texas cases relied upon by Petitioner, and adopted

the Fifth Circuit opinion in Bullard v. Estelle, supra, as the law in Texas. Cooper v. State, ___ S.W.2d ___ (TEX. CRIM. APP. #49,328, decided April 21, 1982). (Slip opinion attached as Appendix A). Four judges of that Court, in concurring opinions, would have decided Cooper on State constitutional grounds as well as Fifth Amendment grounds. TEX. CONST. Article I, Section 19.

The Petitioner's attempt to utilize a Jackson v. Virginia analysis of the Texas Court of Criminal Appeals determination of insufficient evidence at Respondent's first sentencing hearing is clever, but a total smoke screen. No federal court has ever overturned a State Appellate Court's determination of insufficient evidence, and this Court should not be misled into being the first.

With regard to the issue of retroactivity,

> There can be no doubt of the 'retroactivity' of the Court's decision in Benton v. Maryland. In North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072, decided the same day as Benton, the Court unanimously accorded fully 'retroactive' effect to the Benton doctrine. (emphasis added) Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970) at L.Ed.2d 472, ftn. 1

Similarly, this Court has already retroactively applied Burks v. United States, 437 U.S. 1, 57 L.Ed.2d. 1, 98 S.Ct. 2141 (1978) in Greene v. Massey, 437 U.S. 19, 57 L.Ed.2d 15, 98 S.Ct. 2151 (1978), decided the same day as Burks.

REASONS FOR DENYING THE WRIT

I.

BULLARD'S SECOND SENTENCING HEARING AFTER AN APPELLATE REVERSAL FOR INSUFFICIENT EVIDENCE AT HIS FIRST HEARING TO SUPPORT THE TRIAL COURT'S APPLICATION OF THE HABITUAL OFFENDER STATUTE TO HIM DID VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION.

A.

Burks v. United States, Greene v. Massey and Bullington v. Missouri are applicable to Texas' habitual offender sentencing procedures.

The Petitioner's attempt to label the reversal for insufficient evidence in Bullard v. State, 533 S.W.2d 812 (TEX. CRIM. APP. 1976) as "trial type error" conjures notions of Don Quixote jousting with windmills.

Under Texas' bifurcated trial system, at the punishment phase

of a habitual offender trial, the State has the burden to prove beyond a reasonable doubt (Jackson v. State, 571 S.W.2d 1 (TEX. CRIM. APP. 1978)) that:

1. the person named in both enhancement counts is the one and same person that is on trial; (Bullard v. State, 533 S.W.2d 812 (TEX. CRIM. APP. 1976));

2. the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final (Section 12.42(d), V.A.P.C.) and;

3. that the offenses alleged in the enhancement counts are indeed felonies. (Ex Parte Smith, 548 S.W.2d 410 (TEX. CRIM. APP. 1977). (applicable only to out-of-state or federal convictions alleged for enhancement.)

Just as in Bullington v. Missouri, 451 U.S. 430, 68 L.Ed.2d 270, 101 S.Ct. 1852 (1981), citing Addington v. Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979) at L.Ed. 280:

> [Texas'] use of this [reasonable doubt] standard indicates that, as has been said generally of the criminal case, 'the interests of the defendant are of such magnitude that . . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment . . . [O]ur society imposes almost the entire risk of error upon itself.' (first two parenthetical added).

The Court of Criminal Appeals measured the State's factual responsibility against this burden, and found it wanting.

Petitioner's primary reliance upon Porier v. State, 591 S.W.2d 482 (TEX. CRIM. APP. 1980)(en banc) for the proposition that the punishment phase of a criminal trial is "no offense" for double jeopardy purpose is no longer vaild in Texas. Porier was expressly overruled by the Court of Criminal Appeals in Cooper v. State, supra. Cooper is now the law in Texas on the question of the applicability of Bullard v. Estelle, supra, Burks v. United States, supra, Greene v. Massey, supra, and Bullington v. Missouri, supra, to the punishment phase of a habitual offender trial.

Furthermore, the Petitioner's reliance on United States v. DiFrancesco, 449 U.S. 117, 66 L.Ed.2d 328, 101 S.Ct. 426 (1980) is totally misplaced. DiFrancesco was thoroughly distinguished in

the Court of Appeals opinion below and in Bullington itself. The operative facts of Respondent's position are on all fours with those in Bullington, and DiFrancesco has no place in an analysis of Respondent's claim.

B.

Petitioner's reliance upon a Jackson v. Virginia analysis stands that opinion on its head.

Petitioner would have this Court analyze the Texas Court of Criminal Appeals decision in Bullard v. State, 533 S.W.2d., supra, finding the evidence insufficient, by using the standard announced in Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979) for determining the sufficiency of evidence at a State trial. Such a contention hardly merits a response.

As stated in Jackson:

> A challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal constitutional claim. Jackson, supra, at L.Ed.2d 575-76. (emphasis added)

After a jury returns a verdict of acquittal, or the highest appellate court of a state determines, by whatever test, that the evidence to convict was insufficient, no federal constitutional claim can arise. The federal courts have absolutely no authority or power to disturb a state acquittal or factual determination of insufficient evidence to convict. Interestingly, the Petitioner cites no authority for this ever having been done, and the reason is simple. There is none.

C.

The holdings in Burks v. United States, Greene v. Massey and Bullington v. Missouri are retroactive.

Respondent contends that Petitioner's attack on the retroactivity of Burks is moot since this Court has already applied Burks retroactively in Greene v. Massey, supra. Authority for this "same day" retroactivity doctrine can be found in Ashe v. Swenson:

> There can be no doubt of the 'retroactivity' of the Court's decision in Benton v. Maryland. In

> North Carolina v. Pearce (citation omitted), decided the same day as Benton, the Court unanimously accorded fully 'retroactive' effect to the Benton doctrine. Ashe, supra at L.Ed.2d 472 ftn. 1 (emphasis and parenthetical added).

In answer to the Petitioner's "balancing" arguments, the following language from Burks is instructive.

> We recognize that under the terms of the remand in this case the District Court might very well conclude, after 'a blanacing of the equities,' that a second trial should not be held. Nonetheless, where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination. Burks, supra at L.Ed.2d 9 ftn. 6.

To put the matter another way, if the Double Jeopardy Clause is applicable to the punishment phase of a Texas habitual offender trial (see Part A, infra), the Petitioner's chest-beating wails of prejudice are of no concern.

As to the forseeability of Burks and Greene, prosecutors should have had some inkling, because as this Court stated in Bullington, "The decision in Burks was foreshadowed by Green v. United States," . . . Bullington, supra at L.Ed.2d 281.

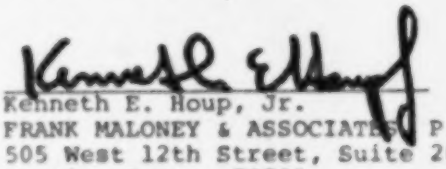
Petitioner has wholly misread Elizalde v. State, 507 S.W.2d 749 (TEX. CRIM. APP. 1974), if he believes that it dealt with illegally admitted evidence. Elizalde was reversed for the very same reason Responder:'s first state conviction was reversed -- the State failed to prove that the person named in the enhancement count was in fact the defendant Elizalde. The Court of Criminal Appeals in reversing Elizalde instructed the trial court to re-sentence the defendant without regard to the unproved enhancement count. Thus, the Court of Appeals was correct when it stated that until Bullard v. State, 533 S.W.2d, supra, the Court of Criminal Appeals had, for a short time, presaged the holdings in Burks, Greene and Bullington.

Respondent agrees with the retroactivity analysis in the Court of Appeals below, and urges this Court to embrace it.

CONCLUSION

For these reasons, and those set out in the opinion of the Court of Appeals below, Respondent respectfully prays that the petition for writ of certiorari be denied, and the judgment of the Court of Appeals be AFFIRMED.

Respectfully submitted,



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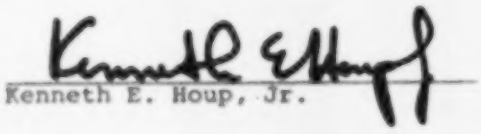
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was delivered by U.S. Mail, to Mr. Douglas Becker, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, 78711, this 10 day of May, 1982.



Kenneth E. Houp, Jr.

JACK WAYNE COOPER, Appellant

NO. 49,328, v. - - - Appeal from Harris County

THE STATE OF TEXAS, Appellee

OPINION

This Court earlier granted appellant an out-of-time appeal in this case. Appellant was convicted of burglary of a habitation. Punishment, enhanced by two prior convictions for burglary, was assessed at life in the Texas Department of Corrections.

Initially, appellant contends that the evidence was insufficient to corroborate the testimony of appellant's accomplice who testified for the State.

The evidence showed that the home of Charles Willingham was burglarized on October 20, 1971. The burglary occurred at some time after noon and before 3:30 p.m. while no one was home. Taken in the burglary were cash, a coin collection, a wedding ring, several guns and other items.

Avis Smith, the accomplice, testified that she and two other girls, one of whom was Brenda Farmer, were good friends of appellant. Smith testified that on October 20, 1971, before noon, she was with appellant. She testified that Brenda Farmer, who was not with them that day, knew the Willinghams. Smith said that they had driven by the house several times previously to case the house in preparation for the burglary.

Smith testified that on October 20 she and appellant were with appellant's brother in an orange-brown Chevrolet with a white top. The brother let appellant and Smith out of the car, apparently some distance from the house. Smith and appellant entered the Willinghams' home by going through the backyard and crawling in a kitchen window. Meanwhile, appellant's brother had moved the car. After completing the burglary, Smith and appellant wandered about the neighborhood with the stolen goods looking for the car. They finally stumbled upon the car and made good their escape.

APPENDIX A

The State then called the Willinghams' next door neighbor, Acelia Avila. Her testimony was somewhat confused. She testified that the day before the burglary she had seen a Chevrolet with a beige or white top and rust colored bottom slowly go by the Willinghams' house and the occupants were staring at the house. She said that early in the afternoon of the day of the burglary she saw the girl who testified earlier (Avis Smith) and appellant get out of that Chevrolet. She said that the Chevrolet was near the driveway of the Willingham home. She positively identified appellant as the man who, with Smith, entered the house. She testified she could see appellant and Smith inside the Willingham home. She testified that there were two other persons left in the Chevrolet while Smith and appellant were in the house. Her testimony conflicted in several respects with Smith's testimony about the details of the burglary but agreed that appellant and Smith were the persons who entered the house.

She later testified under vigorous cross-examination that it was "possible" she saw another man and not appellant in the house. She added on redirect, however, that she was positive in her "own mind" that appellant was the person in the house. A police officer also testified that when he went to arrest appellant, appellant attempted to flee by jumping out of a window.

Appellant initially claims such is insufficient corroboration because the identification was tentative and not positive. Even if the identification were not positive, it need not be positive to provide sufficient corroboration. In Griffin v. State, 486 S.W.2d 948 (Tex.Cr.App. 1972), this Court said:

> "We have examined the record with care and conclude that the testimony falls into the same category as that in Jenkins v. State (Tex.Cr. App. 1972), 484 S.W.2d 900, which held that a less than positive identification is sufficient to corroborate the testimony of an accomplice. See also Williams v. State, Tex.Cr.App., 466 S.W.2d 313." 486 S.W.2d at 950.

See also Valenciano v. State, 511 S.W.2d 297 (Tex.Cr.App. 1974).

Next, appellant contends that because Smith's version of the burglary in time and other details differs from Avila's, there is not sufficient corroboration. We disagree. The test for measuring the sufficiency of the corroboration is whether that evidence tends to connect the defendant with the offense, Pinson v. State, 598 S.W.2d 299 (Tex.Cr.App. 1980). Avila's testimony certainly tended to connect appellant with the burglary described by Smith. As was said in Myers v. State, 7 Tex.App. 640 (Tex.Cr.App. 1880), at 659, discussing the sufficiency of corroboration, "We do not understand that this requires that the different matters testified to by the accomplice are to be supported, each one, by other testimony to the same isolated facts, but that it must tend to connect the defendant with the offense committed."

This Court likewise held in Forbes v. State, 513 S.W.2d 72 (Tex.Cr.App. 1974), that the State need not corroborate the accomplice witness about all of his testimony, it need only produce other evidence tending to connect the defendant to the crime.

Further, we note that appellant's attempt to flee made when the police came to make the arrest, while not alone sufficient, can be considered as a part of the corroboration, Edwards v. State, 417 S.W.2d 629 (Tex.Cr.App. 1968); Jackson v. State, 516 S.W.2d 167 (Tex.Cr.App. 1974). It is the cumulative weight of the corroboration which must be examined to see if sufficient corroboration exists, Chambers v. State, 508 S.W.2d 348 (Tex.Cr.App. 1974). Appellant's ground is overruled.

Next, appellant contends the evidence was insufficient to prove the State's allegation in the indictment that Charles Willingham occupied and controlled the home burglarized. Appellant argues that it was necessary for the State to prove that Charles Willingham was present at the time of the burglary. Since Willingham was not present, appellant contends the evidence was insufficient. We disagree. In Kizer v. State, 400 S.W.2d 333 (Tex.Cr.App. 1966), at 335, we said:

"It is contended that the evidence is not sufficient to support the conviction on the ground that Sam Lawson nor any member of his family (sic) were occupying the house as a private residence on July 23.

"It is not essential that the family or occupant be personally present at the very time the residence is burglarized in order to constitute the offense of burglary of a private residence at night. It is sufficient if it is actually used at the time as a private residence, within the meaning of this article, even though at the time it was burglarized the family was temporarily absent. Handy v. State, 46 Tex.Cr.R. 406, 80 S.W. 526; Warren v. State, 120 Tex.Cr.R. 58, 47 S.W.2d 288."

Appellant argues that reversal of this case is required because, immediately after the selection of the jury, the court gave the jury certain initial general admonishments outside the appellant's presence in violation of Article 33.03, V.A.C.C.P. The admonishments included instructions that the jury was not to deliberate about the case until they had heard all of the evidence. They were told not to discuss their jury service and to avoid contact with the attorneys.

The record, while indicating the appellant was absent at that time, fails to indicate why the appellant was not present. It is not alleged that appellant's counsel was not present. No objection was lodged by appellant's counsel.

Article 33.03, V.A.C.C.P., provides:

"In all prosecutions for felonies, the defendant must be personally present at the trial, and he must likewise be present in all cases of misdemeanor when the punishment or any part thereof is imprisonment in jail; provided, however, that in all cases, when the defendant voluntarily absents himself after pleading to the indictment or information, or after the jury has been selected when trial is before a jury, the trial may proceed to its conclusion. When the record in the appellate court shows that the defendant was present at the commencement, or any portion of the trial, it shall be presumed in the absence of all evidence in the record to the contrary that he was present during the whole trial. Provided, however, that the presence of the defendant shall not be required at the hearing on the motion for new trial in any misdemeanor case."

In Mares v. State, 571 S.W.2d 303 (Tex.Cr.App. 1978), a defendant claimed that Article 33.03, supra, was violated because he had not been present in chambers when certain objections relating to the trial were made and argued. Quoting Cartwright v. State, 259 S.W. 1085 (Tex.Cr.App. 1924), this Court, through Judge Tom Davis, said, "It is not everything that takes place in the absence of a defendant upon trial for which a reversal should be ordered. There must be an actual showing of injury or a showing of facts from which injury might reasonably be inferred." 571 S.W.2d at 305. It was concluded:

> "In the instant case, no request was made by appellant or his counsel to attend the conferences at the bench or in chambers where questions of law were discussed between the court and counsel on both sides. No injury is shown to appellant, nor are there facts from which injury can be inferred. The presence of appellant at such conferences did not bear 'a reasonably substantial relationship to the opportunity to defend.' We find no violation of Art. 33.03, supra, nor do we find that appellant was deprived of any right guaranteed by the Sixth Amendment. No error is shown." 571 S.W.2d at 307.

Similarly, we find no injury here to appellant, and that the presence of the appellant during the admonishments did not bear a reasonably substantial relationship to the opportunity to defend himself.

Complaint is made of the refusal of the trial court to admit photostatic copies of checks offered by appellant. Frances Dunn was an alibi witness for appellant. She testified that on October 19, 1971, appellant was sick at home and went with her to the pharmacist to get a prescription. She testified that on October 20, while appellant was still ill, they together went to purchase a car.

Appellant offered photostatic copies of three checks into evidence as proof of Dunn's testimony. One was dated October 19, one October 20, and one October 21. The first check was made payable to cash. The latter two checks were made out to Able's Pharmacy. All were signed by Frances Dunn. The State objected to these three checks on the ground that admission of the copies would violate the best evidence rule. Appellant never elicited any reason for not

producing the original checks. The witness never testified that the copies were true and correct copies of the originals. The offered copies did not have a copy of the backs of the checks on them. They were not shown to be admissible. See the discussion in Smith v. State, 547 S.W.2d 6 (Tex.Cr.App. 1977), at page 12, and McCormick on Evidence, Section 230, page 560 (2nd Ed. 1972). No error is shown.

Appellant attempted to introduce testimony by O. L. Ware, a principal at a junior high school, that school records reflected that Brenda Farmer was in school on October 20. Appellant was allowed to call Farmer to the stand and elicit from her that she was in school that day. Appellant contends that the refusal to allow Ware to testify constituted reversible error. Smith specifically stated that Farmer was not with the group that committed the burglary. Avila, on questioning by appellant, testified that she had tentatively identified Farmer as being among those participating in the burglary but she was not sure. No harm is shown. Furthermore, appellant failed to lay a proper predicate for the admission of the records or testimony derived from them.

The State alleged two prior convictions for enhancement purposes: a July, 1965 conviction for burglary, and a December, 1968 conviction, also for burglary. On appeal, appellant contends that the State failed to prove that the 1968 conviction was for an offense committed after the 1965 conviction.

There was nothing in the pen packet introduced by the State that indicated when the offense for which appellant was convicted in 1968 occurred. Cf. Espinoza v. State, 463 S.W.2d 8 (Tex.Cr.App. 1971). The State did call an officer who testified that he arrested appellant for a burglary which occurred October 14, 1967. However, the State failed to show that it was the October, 1967 burglary that resulted in the December, 1968 conviction. Cf. Richardson v. State, 432 S.W.2d 100 (Tex.Cr.App. 1968). Therefore, the State failed to meet its burden of proving that the conviction in 1968 was for an offense occurring after the date of the 1965 conviction.

In the past, this Court has held that the proper remedy in this type case was to remand the case back to the trial court for a new trial if the jury originally assessed punishment or a new punishment hearing if the penalty phase had been before the court alone. And in either case we allowed the State another attempt to meet its burden of proof as to the enhancements in the punishment portion of the trial. See Porier v. State, 591 S.W.2d 482 (Tex.Cr. App. 1979). The majority in Porier held that the enhancement procedures did not create an offense and that the prior conviction and its date was "a historical fact." The error it was said "in improper proof then goes to the method of proof, not the validity of the event." The majority in Porier seems to equate the practice of using a prior conviction to enhance a new offense with relitigating whether such an enhancement allegation is true after the allegation has failed in proof when it was initially litigated.

However, in reading Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), the gravamen of these holdings is that it violates the double jeopardy clause of the United States Constitution to allow the State to make an allegation, attempt to prove that allegation, fail to do so and yet be able to attempt to again prove such allegation in another trial or hearing in the same cause. We feel that is what would happen in this instance if the State were allowed another opportunity to prove the enhancements in this case, in light of Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). We would note that the case before us is not an instance in which the State has made an allegation and the proof simply shows a variance.

Here, however, the State had alleged and had to prove that the 1968 conviction was for an offense occurring after the 1965 conviction. This it failed to prove.

Bullington was a capital murder case. Under Missouri's bifurcated system, once a defendant has been convicted of capital murder, the jury must then hear punishment evidence and determine whether any of ten listed aggravating factors exist and/or whether any of seven mitigating factors are extant. A jury which imposes the death penalty must designate in writing the aggravating factors they found existed beyond a reasonable doubt. The jury must also be convinced beyond a reasonable doubt that such factors warrant the imposition of the death penalty. The jury need not impose death as the punishment even it if decides that sufficient aggravating factors exist and are not outweighed by mitigating factors.

Bullington was convicted of capital murder. The jury assessed punishment at life. Bullington was later granted a new trial. Bullington attempted thereafter to prohibit the State from seeking the death penalty. The Supreme Court held that the State could not seek the death penalty.

The Supreme Court initially noted that the Double Jeopardy Clause is no absolute bar to harsher sentences at a retrial after a defendant has succeeded in appealing a conviction. However, the Supreme Court pointed out that unlike most cases in which the entity which sets punishment acts through its discretion, in that case the original jury had apparently made a finding and "acquitted the defendant of whatever was necessary to impose the death sentence." 68 L.Ed.2d at 283.

Similarly, when this Court holds that the evidence was insufficient as to the date of the commission of the prior offense, it essentially is an acquittal of a disputed question of fact. To allow the State to attempt at a new hearing to produce the proof that it could not produce at the initial hearing is to again subject the defendant to jeopardy. Bullington tells us that the Double Jeopardy Clause can apply to punishments when the punishment depends on whether the State has proved or failed to prove specific punishment allegations. When the punishment does depend on such allegations and the State fails to prove them initially, the State may not attempt to make the defendant endure a relitigation of the issue.

The case of United States v. Di Francesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), can be distinguished. In that case, the government appealed a defendant's sentence pursuant to 18 USC, Sections 3575 and 3576, as a special offender. The Supreme Court held that it was constitutional for the government to request a review of the sentence and for the sentence to be increased upon that review. The Supreme Court noted that such review did not involve a retrial or provide the government with a second bite at an unproved apple. See Swisher v. Brady, 438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1979). Here, however, that is exactly what the State would be accorded if the State were allowed another attempt to prove the date of occurrence of the offense that resulted in the 1968 conviction.

Recently, in Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), the Fifth Circuit was confronted with the issue before us today. Bullard had been convicted of felony theft and his punishment, enhanced by two prior felonies, was assessed at life in the Texas Department of Corrections. This Court, in Bullard v. State, 533 S.W.2d 812 (Tex.Cr.App. 1976), held that the State's evidence was insufficient to prove that he was the same person convicted in one of those prior convictions. In that case the trial court, not the jury, had found the enhancements to be true. Therefore, this Court remanded the case

back to the trial court for a new punishment hearing and we said that at that new hearing, ". . . the State may again attempt to prove the prior conviction for the purpose of enhancing the punishment." This the State successfully did. His new conviction and sentence of life in the Texas Department of Corrections were upheld by this Court in Bullard v. State, 548 S.W.2d 13 (Tex.Cr.App. 1977). However, on federal habeas corpus, Bullard contended that allowing the State a second opportunity to attempt to prove the enhancement allegation that it was unable to prove in the first trial violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. The Fifth Circuit concluded:

> "Because Bullard was once subjected to an enhancement proceeding, because the appellate court found insufficient evidence of habitual offender status, thus leading to Bullard's implicit acquittal as a habitual offender, and because resentencing would require a second trial with the State having an unwarranted 'second bite at the apple' to prove facts that it failed to prove initially, the double jeopardy clause bars this second trial-like enhancement to life proceeding."

Though this Court is not bound by the constitutional interpretation of the Fifth Circuit, Flores v. State, 487 S.W.2d 122 (Tex. Cr.App. 1972), we agree with the decision reached by that court in Bullard. We, therefore, hold as a matter of federal constitutional law compelled by Bullington that if the State fails to sufficiently prove all facts necessary to find an enhancement paragraph "true", the State may not, at a new hearing in that cause have a second opportunity to prove the original allegations.

We do not today intimate that if appellant were later charged in another indictment with a new offense that the State would be foreclosed from alleging and proving the same enhancement allegations made here. Such would not subject the appellant to multiple determinations of the State's allegations in the same case. To the extent this holding conflicts with Porier v. State, supra; Kormarke v. State, 562 S.W.2d 230 (Tex.Cr.App. 1978); Tyra v. State, 534 S.W.2d 695 (Tex.Cr.App. 1976), and Bullard v. State, 533 S.W.2d 812 (Tex.Cr.App. 1976), those cases are expressly overruled.

The proof in this instance was sufficient to show proof of a prior burglary. The law at the time of the offense provided that upon proof of one prior conviction of the same nature the punishment for burglary was automatically set at twelve years. Therefore, the judgment is affirmed and the sentence reformed to reflect that punishment is to be assessed at twelve years in the Texas Department of Corrections, Rounsavall v. State, 480 S.W.2d 696 (Tex. Cr.App. 1972).

McCormick, Judge

(Delivered April 21, 1982)

En Banc

JACK WAYNE COOPER, Appellant

NO. 49,328 Vs. Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

CONCURRING OPINION

In Elizalde v. State, 507 S.W.2d 749 (Tex.Cr.App. 1974), the State, as in the instant case, failed to sustain its burden of proof as to a prior conviction alleged for enhancement of punishment. The trial court nevertheless assessed punishment under Article 62, V.A.P.C., 1925. On appeal this court remanded to the trial court for the assessment of punishment under the range of punishment provided for the primary offense of burglary with intent to commit theft (Article 1397, V.A.P.C., 1925). There an unanimous court stated: "In assessing the punishment, the court shall consider the record made at the trial of the case, omitting the evidence which we have held inadmissible." The State was thus not permitted a second bite at the apple. Today we reach the same result.

Regrettably in Bullard v. State, 533 S.W.2d 812 (Tex.Cr. App. 1976), the majority, over this writer's dissent, overruled Elizalde to the extent of any conflict. In Bullard the majority stated:

> "Inasmuch as the State's proof of prior convictions is insufficient, the proper remedy is to set aside the life sentence and remand the case to the trial court for a new hearing or trial on the issue of punishment to be assessed by the court, at which time the State may again attempt to prove the prior convictions for the purpose of enhancing punishment . . . ."

Of course this was wrong. Article I, § 19, Texas Constitution, and the Due Process Clause of the Fourteenth Amendment and the double jeopardy provisions of the federal and state Constitutions were in place at the time. We shouldn't

have needed Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), or Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), to see that double jeopardy, due process and fundamental fairness were all involved.

I applaud today's overruling of Bullard v. State, supra, and its progeny. Elizalde is again alive and well.

I concur.

ONION, Presiding Judge

(Delivered April 21, 1982)
En banc

JACK WAYNE COOPER, Appellant TC-82-16-017

NO. 49,328 vs. - - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

CONCURRING OPINION

I concur in the decision to overrule Porier v. State, 591 S.W.2d 482, for the reasons stated in the opinion concurring in part and dissenting in part in that case. I write today to state that retrial of the punishment issue would violate not only the principles upon which Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, and Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15, were decided, as held by the majority, but also would deny appellant due course of law under Art. 1, Sec. 19, Texas Constitution. Today's decision should be grounded on both federal and state constitutional principles.

ODOM, Judge

(Delivered April 21, 1982)

En Banc

Judges Clinton and Teague join this opinion

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NO. 81-1774

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

W. J. ESTELLE, JR.,
Petitioner

V.

CHARLES EDWIN BULLARD,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION TO PROCEED IN FORMA PAUPERIS

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MOTION TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE JUSTICES OF SAID COURT:

Comes now the Respondent, Charles Edwin Bullard, by and through his counsel appointed by the Fifth Circuit Court of Appeals, and pursuant to Rule 46, moves this Court for leave to proceed In Forma Pauperis.

Respondent proceeded Pro Se in the District Court for the Northern District of Texas, and sought successfully to proceed In Forma Pauperis when the State of Texas appealed an adverse ruling of the District Court. Undersigned counsel was appointed by the Fifth Circuit Court of Appeals to represent Respondent in that appeal.

WHEREFORE, premises considered, Respondent respectfully requests that he be granted leave to proceed In Forma Pauperis.

Respectfully submitted,

Kenneth E. Houp, Jr.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing MOTION TO PROCEED IN FORMA PAUPERIS was delivered by U.S. Mail, to Mr. Douglas Becker, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, this 20 day of May, 1982.

Kenneth E. Houp, Jr.

Petitioner's Brief

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No. 81-1774

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

W.J. ESTELLE, JR.,
Petitioner

V.

CHARLES EDWIN BULLARD,
Respondent

On Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(1) Are *Burks v. United States*, 437 U.S. 1 (1978), *Greene v. Massey*, 437 U.S. 19 (1978), and *Bullington v. Missouri*, 451 U.S. 430 (1980), applicable to Texas habitual offender sentencing procedures?

(2) Are *Burks v. United States*, *Greene v. Massey*, and *Bullington v. Missouri*, retroactive?

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No. 81-1774

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

W.J. ESTELLE, JR.,

Petitioner

V.

CHARLES EDWIN BULLARD

Respondent

On Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W.J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner herein, by and through his attorney, the Attorney General of Texas, and submits this his brief:

OPINIONS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, on August 27, 1980, entered a judgment and memorandum order granting Respondent Charles Edwin Bullard's application for writ of habeas corpus under 28 U.S.C. §2254. (Appendix A to the petition for writ of certiorari, hereinafter "App. A"). Petitioner's timely filed motion for new trial was denied in a memorandum order filed on September 26, 1980. (App. B). Both the district court's rulings are published in *Bullard v. Estelle,* 502 F.Supp. 887 (N.D. Tex. 1980). On January 20, 1982, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment in an opinion (App. C) published as *Bullard v. Estelle,* 665 F.2d 1347 (5th Cir. 1982).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit on January 20, 1982, entered its judgment in this case. That judgment disposed of the constitutional questions now raised by Petitioner in a manner adverse to his interests. Petitioner filed a petition for writ of certiorari in this Court within ninety days on March 23, 1982. 28 U.S.C. §2101 (c). Accordingly, this Court has jurisdiction over the case under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Since this case presents double jeopardy questions, it involves the Fifth Amendment to the United States Constitution, as applicable to the states by the Fourteenth Amendment. The relevant portions of these constitutional provisions are set forth below:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."

U.S. Const. amend. V.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, sec. 1.

The case also involves the Texas repeat and habitual felony offender statute, Tex. Penal Code Ann. §12.42:

> (a) If it be shown on the trial of a third-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a second-degree felony.
>
> (b) It if be shown on the trial of a second degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a first-degree felony.
>
> (c) If it be shown on the trial of a first-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 15 years.

> (d) If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.

STATEMENT OF THE CASE

The facts are not in dispute.

Respondent Charles Edwin Bullard pled not guilty to felony theft before a Dallas, Texas, jury and trial began on April 14, 1975. The following day, the jury found him guilty. Pursuant to Bullard's written election, the jury was excused and the trial judge alone presided over the punishment hearing. By virtue of two of his several prior felony convictions, Cause Nos. C-70-6579-MN, and D-7519-JI, Bullard was charged with being a habitual offender under Texas law, Tex. Penal Code Ann. §12.42(d). *See, Rummel v. Estelle,* 445 U.S. 263 (1980).

Deputy Sheriff John Slovak, a fingerprint expert from the Dallas County Sheriff's Department, testified that he had taken Bullard's fingerprints earlier that day. He testified that in the supporting documents of each prior conviction, one Charles Edwin Bullard was the man named as the convicted defendant. Further, each prior conviction contained a set of fingerprints. Bullard's fingerprints taken the day of trial were identified as State's Exhibit No. 1. The conviction and fingerprints in Cause No. C-70-6579-MN were identified as State's Exhibit No. 2. The record of the conviction and fingerprints in Cause No. D-7519-JI was identified as State's Exhibit No. 3. Slovak then testified as follows:

Q: (By Mr. Walker [Assistant District Attorney]) Deputy Cron (sic), would you compare the—Deputy Slovak, excuse me—would you compare the prints that is on State's Exhibit No. 1 to the exhibit that is on State's Exhibit No. 2?

A: (By the witness [John Slovak]) Yes, sir, I did.

Q: Okay. Have you done that?

A: Yes, I have.

Q: I'll ask you if those prints were made by one in the same person?

A: Yes, sir, they were.

Q: Is there any doubt in your mind that those were made by anyone else other than the Defendant in this cause?

A: No, sir.

Q: Again, I'll ask, do those records indicate a Charles Edwin Bullard was convicted in Cause No. D-7519-JI?

A: Yes, sir.

Q: And also in Cause No. C-70-6579-MN?

A: Yes, sir.

(SOF 93-94).

Bullard did not testify or present any other controverting evidence. His attorney did not object to the proof. The trial court found that he was the same person

previously convicted in the prior convictions alleged for enhancement and accordingly assessed punishment at life imprisonment.

On appeal the Texas Court of Criminal Appeals held this proof inadequate to show that Bullard was the same man convicted in Cause No. D-7519-JI because "at no time did Deputy Slovak testify that the fingerprints he had taken of the Appellant were made by the same person whose fingerprints appeared on State's Exhibit No. 3." *Bullard v. State,* 533 S.W.2d 812, 816 (Tex.Crim.App. 1976). In accordance with state law, the court remanded for a new punishment hearing.

At the time of the remand, the record reflects that the district attorney's office in Dallas County had several other felony indictments pending against Bullard for burglary of a habitation and burglary of a vehicle, both felonies. (Joint Appendix, hereinafter "J.App.," 38). After the court conducted a new sentencing hearing on March 26, 1976, free of any infirmity and resulting in another life sentence, these other indictments were dismissed in accordance with the district attorney's ordinary practice. (J.App. 38).

Again Bullard appealed, and the Court of Criminal Appeals affirmed both the conviction and the life sentence. *Bullard v. State,* 548 S.W.2d 13 (Tex.Crim.App. 1977).

After exhausting his state court remedies, Bullard on April 17, 1978, filed his ultimately successful federal habeas corpus application. The Fifth Circuit Court of Appeals on January 20, 1982, affirmed the granting of the writ. These proceedings followed.

SUMMARY OF THE ARGUMENT

The basis of Respondent Bullard's initial remand for a new punishment hearing in the Texas Court of Ciminal

Appeals was not of the sort intended to be encompassed by the holdings in *Burks v. United States*, 437 U.S. 1 (1978), *Greene v. Massey*, 437 U.S. 19 (1978), and *Bullington v. Missouri*, 451 U.S. 430 (1980).

In light of the purposes underlying the double jeopardy clause, *Burks* and *Greene* have no applicability to the punishment stage of a bifurcated trial in Texas. A convicted felon does not have a valid expectation of finality attendant to an erroneously imposed sentence. Although it is sometimes said that the double jeopardy clause protects against multiple punishments as well as multiple convictions, Respondent has received only one punishment, not two; every day he has spent in custody has been credited toward his eventual life sentence, the only one he must serve.

Further, Respondent never had a valid expectation that he would receive any sentence less than life imprisonment, which was the very sentence originally imposed. His appellate reversal for insufficient evidence was accompanied by a specific directive that he should be retried as to punishment. An appellate reversal should be viewed differently from a jury finding for the former does not implicate any interest of nullification. For that reason, *Bullington v. Missouri* is inapplicable.

In addition, *Bullington* involved the death penalty, which is unlike any other criminal punishment because of its immutable nature. All other sentences are variable because of differing provisions for good conduct time credit, parole, early discharge, commutation, and such factors. When a changeable sentence is involved, the Court should, as in *United States v. Di Francesco*, 449 U.S. 117 (1980), apply the traditional rule, that the double jeopardy clause does not bar harsher resentencing when the original sentence is invalidated, regardless of the reason for that invalidation.

In any event, *Burks, Greene,* and *Bullington* cannot help Bullard unless they are applied retroactively, and it was error for the Court of Appeals to hold that they should be so applied. Plainly the Court has held that not all double jeopardy decisions are retroactive. The proper test for deciding whether a double jeopardy decision is retroactive under *Robinson v. Neil,* 409 U.S. 505 (1973), emphasizes the extent of good faith detrimental reliance by law enforcement authorities on the old standards. Here, the good faith aspect of reliance is obvious. The Court found it necessary to overrule many of its own prior cases in handing down the decisions in *Burks* and *Greene.* Those decisions represent a complete reversal of prior precedent.

Detrimental reliance is also shown. Two apparent commonly recurrent prejudicial sets of circumstances emerge. First, at the original trial that ended in reversal, the prosecutor may well have had additional evidence in support of guilt or punishment that he would have presented, except that he was totally unaware and could not reasonably have been aware that that was his last opportunity to do so. Under such circumstances, the prosecutor should not be unfairly penalized for having made a good faith legal judgment with a great deal less than knowledge of all the circumstances.

Second, and even more likely, if a criminal defendant's sentence is overturned for insufficient evidence to support proof of his identity as the perpetrator of the prior convictions, the prosecutor on remand may have more than one option. It may be that he can simply conduct a new punishment hearing or, as was true in Bullard's case, he may have had other charges that he could have brought against Bullard. If he had known that years later, a federal court construing a decision of this Court would hold that the maximum punishment to which Bullard could be subjected was twenty years—as the courts below held in this case—then the prosecutor

might well have brought other charges against Bullard in order to increase the punishment. But the prosecutor had no inkling of such legal eventualities, nor can it reasonably be argued that he should have had such foresight.

So the prosecutor here, like many others elsewhere, abandoned other prosecutions in order to complete the initial prosecution. As is commonly the case in such circumstances, the other charges were dismissed upon the obtaining of a final conviction on the original charge. The statutes of limitation have long since run as to such other charges. Detrimental reliance is thus shown.

ARGUMENT

A. BURKS V. UNITED STATES, 437 U.S. 1 (1978), GREENE V. MASSEY, 437 U.S. 19 (1978) AND BULLINGTON V. MISSOURI, 451 U.S. 430 (1980) ARE NOT APPLICABLE TO TEXAS HABITUAL OFFENDER SENTENCING PROCEDURES.

In a concurring opinion to *Greene v. Massey,* 437 U.S. 19, 27 (1978), Mr. Justice Rehnquist cautioned against the overbroad and unreasoned application of the holdings in *Burks* and *Greene:*

> I would want to emphasize more than the Court does in its opinion the varying practices with respect to motions for new trial and other challenges to the sufficiency of the evidence both at the trial level and on appeal in the fifty different States in the Union. Thus, to the extent that Florida practice in this regard differs from practice in the federal system, the impact of the Double Jeopardy Clause may likewise differ with respect to a particular proceeding.

Respondent Bullard's limited reversal and remand in *Bullard v. State*, 533 S.W.2d 812 (Tex.Crim.App. 1976), was not upon the sort of ground intended by this Court to be encompassed within the holdings of *Burks v. United States*, 437 U.S. 1 (1978), and *Greene v. Massey*, 437 U.S. 19 (1978). It is true that in remanding Bullard's case for a new punishment hearing,[1] the Court of Criminal Appeals phrased the matter as follows:

> "The State's evidence is therefore insufficient to identify the Appellant as the defendant who was convicted in Cause No. D-7519-JI in Criminal District Court No. 2 in Dallas County."

Bullard v. State, 533 S.W.2d at 816. Nevertheless, in terms of *Burks v. United States* and *Greene v. Massey* analysis, this sort of error is trial type error and not error pertaining to general insufficiency of the evidence. The Court of Criminal Appeals has several times specifically so held in the context of the habitual offender statute. *E.g., Girnus v. State*, 595 S.W.2d 118 (Tex.Crim.App. 1980); Porier v. State, 591 S.W.2d 482 (Tex.Crim.App. 1980)(*en banc*).[2]

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1. In Texas, criminal trials are bifurcated. Tex. Penal Code Ann. §37.07. After the determination of guilt the jury is then appraised of circumstances affecting sentence, such as prior convictions, and the jury, or the judge if the defendant has elected to waive a jury, assesses punishment. This sentencing proceeding where the state must prove beyond a reasonable doubt that prior convictions occurred is a part of the trial. Tex. Penal Code Ann. § 12.42.

2. Recently in accordance with the holding of the Court of Appeals in this case, the Court of Criminal Appeals announced that henceforth Texas practice must comply with the holding in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982) *See Cooper v. State*, _____S.W.2d_____, No. 49, 328 (Tex.Crim.App., April 21, 1982). This circumstance is, of course, totally irrelevant to any issue before the court.

The pertinent portion of the Fifth Amendment provides:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ... U.S. Const. amend. V.

Punishment is generally not an "offense" at all. Habitual offender status is particularly not an "offense" as that term is commonly understood in the criminal law, but only a reason why punishment should be more severe.

As discussed in detail in *Porier v. State,* 591 S.W.2d 482, 483-84 (Tex.Crim.App. 1980) (en banc), the punishment phase of a criminal trial involves no "offense" within the meaning of the double jeopardy clause of the Constitution. *Sanabria v. United States,* 437 U.S. 54 (1978), stands for this proposition, as does *Spencer v. Texas,* 385 U.S. 554 (1967). In *Spencer* the Court upheld the use of recidivist statutes against a contention that the statutes themselves violate the double jeopardy clause of the Constitution.

Similarly, the Court of Criminal Appeals in a long and unbroken line of authority has held that both Tex. Penal Code §12.42(d), and its statutory predecessor, Article 63, V.A.P.C., do not violate double jeopardy principles:

> ... As the Court pointed out in *Phariss v. State,* 149 Tex.Crim.App. 489, 196 S.W.2d 826, in rejecting a like contention, the State in alleging the prior convictions was not seeking to again convict the defendant, but was merely seeking to enhance his punishment for the offense for which he was then on trial in the event of conviction. The provisions of the Article did not create an offense, inflict additional punishment for a prior offense, or authorize a conviction on

> a habitual criminal charge; they merely prescribe more severe punishment based on persistence in crime. 16 Tex.Jur.2nd, Secs. 403 and 404, pp. 624 and 625.

Mullins v. State, 409 S.W.2d 869 (Tex.Crim.App. 1966), *quoted in, Porier v. State,* 591 S.W.2d at 484.

Thus, the term "sufficiency of the evidence" is not a talisman that automatically invokes all the protections of *Burks* and *Greene.* Instead, the federal district court should look to the *substance* of the type of trial error for which the state court reversed the conviction. If the lower court had done so in this case, it would have realized that only by straining state law pertaining to habitual offenders beyond any reasonable interpretation can it be concluded that such matters pertain to any problem concerning sufficiency of the evidence to support proof of offenses that the Court has addressed in *Burks, Greene,* or *Jackson v. Virginia,* 443 U.S. 307 (1979).

It is true that, "[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Ex parte Lange,* 18 Wall. 163, 173, 21 L.Ed. 872, 878 (1874), *quoted in, North Carolina v. Pearce,* 395 U.S. 711, 718 (1969). The Court of Appeals seized upon such dicta as support for its position. But a careful examination of *Ex part Lange* reveals that the conduct condemned in that case was the imposition of *two separate* punishments where only one was authorized by statute. In *Lange* the trial court erroneously imposed both a fine and imprisonment, even though the Court was authorized under the statute to impose only one or the other of these two punishments. "As *Ex parte Lange* demonstrates, a defendant may not receive a greater sentence than the legislature has authorized." *United States v. DiFrancesco,* 449 U.S. 117, 139 (1980). And the Court has stated that in many circumstances subjec-

ting a defendant to an even *greater* penalty upon retrial does not implicate the double jeopardy clause, although it may implicate the due process clause. *North Carolina v. Pearce,* 395 U.S. 711, 723 (1969). Even *Burks* itself specifically states that an "improper sentence" is a trial-type error, citing an old English case, and one that does not implicate the double jeopardy clause. *Burks v. United States,* 437 U.S. 1, 14 n.8 (1978).

The very recent case of *United States v. DiFrancesco,* 449 U.S. 117 (1980), strongly supports the State's position. In *DiFrancesco,* the Court upheld against a double jeopardy challenge a federal statute that allowed the government to appeal under certain circumstances a sentence that it regarded as too lenient. DiFrancesco had argued like Bullard in the instant case that since the double jeopardy clause applies to punishment as well as guilt, then he could not be subjected to a second greater punishment at the whim of the government. This Court rejected the claim:

> [O]ur task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of the Court, nor even considerations of double jeopardy policies support such an equation.

United States v. DiFrancesco, 449 U.S. at 132.

The Court reasoned that historically, the accused had very little interest in the finality of a sentence, as opposed to the finality of a criminal judgment. He is constantly subject to changes in his sentence. A criminal sentence may become longer or shorter depending upon the actions of a parole board or other entity

with the authority to commute sentences. The Court's own prior decisions had never accorded any great finality to sentences in criminal cases. The Court held that the dissenters in *DiFrancesco* flatly misread *North Carolina v. Pearce* as implicating the double jeopardy clause at all in punishment proceedings. *United States v. DiFrancesco,* 449 U.S. at 135-36 n. 14.

In short, the Court held that a convicted felon ordinarily has a very minimal valid expectation of finality in his sentence. Because he legitimately has no such expectation, the double jeopardy clause of the Constitution applies only in extremely limited circumstances to resentencing. The double jeopardy clause simply "does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." 449 U.S. at 137. Repeated attempts to find an accused guilty will drain him emotionally and financially. Having once been found innocent, he may unfairly be cast again into the fray, and have to defend himself and his reputation anew. No such dilemma is posed for the convicted felon who must simply relitigate the proper range of punishment. He already stands convicted; the only remaining question is the appropriate punishment. Since he knows that he is going to prison, his interest, if any, in not having to defend against more than one attempt to incarcerate him for the maximum amount of time is significantly diminished. It should lead to a different result in this case from one involving insufficiency of the evidence at the guilt or innocence stage of trial.

In rejecting these arguments the Court of Appeals relied upon *Bullington v. Missouri,* 451 U.S. 430 (1981). The Court had *never* previously relied upon the double jeopardy clause to invalidate a second sentencing proceeding. *See, e.g., Stroud v. United States,* 251 U.S. 15 (1919); *North Carolina v. Pearce,* 395 U.S. 711 (1969); *Colten v. Kentucky,* 407 U.S. 104 (1972); *Chaffin v.*

Stynchcombe, 412 U.S. 17 (1973); United States v. Di *Francesco,* 449 U.S. 117 (1980). In *Bullington,* however the Court applied *Burks* and *Greene* to Missouri capital punisment procedures. The Court of Appeals accurately noted numerous similarities between the Missouri procedures and Texas procedures at the punishment stage of an alleged habitual offender's trial.

In light of these similarities, a different case might be presented if the state trial judge had found the State's evidence insufficient upon punishment and consequently assessed a punishment less than life imprisonment. Even if the State should have had no second opportunity to prove its case under those circumstances, a different result should follow from an *appellate* court's reversal.

The Court of Appeals pointed out that with respect to guilt or innocence, it is an irrelevant distinction under *Burks* and *Greene* whether the evidentiary insufficiency is found by the trial or appellate court. *Bullard v. Estelle,* 655 F.2d at 1361-62 n. 30, App. C-39. Petitioner here contends that precisely because of the decreased expectation of sentencing finality by a criminal defendant, the distinction is a valid one in a punishment context. Since Respondent Bullard continuously remained in jeopardy of receiving life imprisonment, the double jeopardy clause should not be construed as barring that punishment.

An additional distinction between *Bullington* and this case is that the former involved the death penalty. The Court has on several occasions noted the unique irrevocability of a death sentence. *E.g., Rummel v. Estelle,* 445 U.S. 263 (1980). One important reason why the Court has consistently refused to use the double jeopardy clause to invalidate second sentencing proceedings is that "sentences" are ordinarily flexible such that a criminal defendant has a greatly diminished ex-

pectation of finality regarding his sentence. A death sentence, however, like an adjudication of guilt, has only one meaning. Therefore, a defendant who has defeated the state's attempt to inflict the death penalty upon him stands in a position similar to a defendant who has defeated the state's attempt to incarcerate him:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Green v. United States, 355 U.S. 184, 187-88 (1957). These considerations, which Mr. Justice Black eloquently directed at a finding of innocence, seem appropriate also to a capital defendant who has successfully "run the gantlet once" as to the death penalty. *Id.* at 190. They are inappropriate, however, to the circumstances of any other convicted felon. For these reasons, the rule of *Bullington* should not be extended to the Texas habitual offender sentencing procedures.

B. BURKS V. UNITED STATES 437 U.S. 1 (1978), GREENE V. MASSEY, 437 U.S. 19 (1978) AND BULLINGTON V. MISSOURI, 451 U.S. 430 (1980), SHOULD NOT BE HELD RETROACTIVE.

In *Burks v. United States,* 437 U.S. 1 (1978), and *Greene v. Massey,* 437 U.S. 19 (1978), this Court overruled a long line of its own authorities in order to hold that the Double Jeopardy Clause of the United States

Constitution bars retrial when a criminal defendant has obtained an appellate reversal of his case because of insufficiency of the evidence. The Court reasoned that if the evidence were legally insufficient at trial, then theoretically the case should never have been submitted to the jury at all, but instead any defendant who at the close of the State's evidence moved for an instructed acquittal would have been entitled to one.

For this reason, the Court held that all defendants are entitled to the double jeopardy benefits of the State's failure to prove sufficient evidence at its initial opportunity. The Court, however, failed to rule explicitly whether its holding would apply retroactively so as to invalidate the convictions of all defendants who had already been retried and reconvicted in criminal proceedings supported by sufficient evidence and free of any other constitutional infirmity.[3] The same is true in *Bullington v. Missouri*, 451 U.S. 430, where the Court applied *Burks and Greene* to Missouri capital sentencing procedures.

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3. It is worth noting that there are numerous reasons why the State during the second prosecution might adduce constitutionally sufficient evidence after failing to do so during the first. Of some importance is the possibility that the passage of time might produce additional evidence. More significantly, the State often possesses inculpatory and often damning evidence that it chooses not to introduce because it may be held inadmissible on appeal. The evidence may be a fruit of a search that the State fears will ultimately be hold improper, or a confession that might on appeal be held coerced. The evidence may be of arguable but less than certain admissibility for many other reasons that may cause the prosecution to seek a conviction without it.

It is also possible that the State may withhold weak but legally sufficient evidence because it chooses to rely in good faith but erroneously upon evidence that ultimately on appeal is held to be inadmissible. *See, United States v. Block*, 590 F.2d 535, 540 n.12 (4th Cir. 1978); Note, 31 U.Chi.L.Rev. 365 (1964).

The criteria for determining retroactivity of double jeopardy decisions were set out in *Robinson v. Neil*, 409 U.S. 505 (1973). At issue there was the retroactivity of the double jeopardy holding in *Waller v. Florida*, 397 U.S. 387 (1970).

The Supreme Court noted that the analysis embodied in *Linkletter v. Walker*, 381 U.S. 618 (1965), which is based upon protecting "the very integrity of the fact-finding process,"[4] *id.* at 639, is "not appropriate" in the context of double jeopardy decisions, *Robinson v. Neil* at 509. The Court continued to note, however, the "element of reliance embodied in the *Linkletter* analysis...".

Thus, the Court, cautioning against the view that its rule of decision "is an ironclad one that will invariably result in the easy classification of cases in one category or another,"[5] *id.* at 509, suggested a two-prong good

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4. This analysis, as summarized in *Stovall v. Denno*, 388 U.S. 293 (1967), emphasizes the purpose to be served by the new standards, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. *Desist v. United States*, 394 U.S. 244 (1969).

5. Indeed, in the most recent double jeopardy-retroactivity cases located by the State, some have held this Court's double jeopardy decisions to be retroactive, and some refused to do so. In *Mizell v. Attorney General of New York*, 586 F.2d 942 (2d Cir. 1978), *cert. denied*, 440 U.S. 976 (1979), the Court's decision in *Crist v. Bretz*, 437 U.S. 28 (1978), was held retroactive. In *Holt v. Black*, 550 F.2d 1061 (6th Cir.), *cert. denied*, 432 U.S. 910 (1977), the court held *Breed v. Jones*, 421 U.S. 519 (1975), retroactive, whereas a contrary conclusion was reached in *Jackson v. Justices of the Superior Court of Mass.*, 549 F.2d 215 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977). In *United States v. Rumpf*, 576 F.2d 818 (10th Cir. 1976), *cert. denied*, 439 U.S. 893 (1978), the decision in *Abney v. United States*, 431 U.S. 651 (1977), was held to be prospective only. Finally, in *Blackburn v. Cross*, 510 F.2d 1014 (5th Cir. 1975), the court af-

(footnote continued on following page)

faith reliance and prejudice test. This test would focus first on whether the State's reliance on the prior rule was supported by case law such that the new constitutional decision "marked a departure from past decisions of this Court." *Robinson v. Neil* at 511. If so, the State's reliance upon earlier constitutional decisions, both state and federal, would obviously be in good faith. Second, the Court might examine the nature and form of prejudice the State would suffer from retroactive application of the constitutional rule and the extent of the unfairness of such prejudice, compared to the beneficial effect on the valid interests of defendants in such retroactive application.

Applying this test to the facts before it, the Court held *Waller v. Florida* retroactive, stating first that "[the] decision in *Waller* cannot be said to have marked a departure from the past decisions of this Court." *Robinson v. Neil* at 510. The Court in effect held that the State should have realized that municipalities and states were sufficiently parts of one sovereign that criminal prosecution by one would bar later criminal prosecution by the other—the essential holding of *Waller v. Florida*.

By contrast, the decisions of the Court in *Burks v. United States* and *Greene v. Massey* marked a significant departure from prior decisions. The Court itself acknowledged, "The Court's holdings in this area, begin-

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forded full retroactive status to the collateral estoppel doctrine of *Ashe v. Swenson*, 397 U.S. 436 (1970).

Two other courts have held *Burks* and *Greene* retroactive. The Ninth Circuit did so with no analysis whatsoever in *United States v. Bodey*, 607 F.2d 275 (9th Cir. 1979). And a divided Texas Court of Criminal Appeals so held in *Ex parte Reynolds*, 588 S.W.2d 900 (Tex.Crim.App. 1979), *cert. denied*, 445 U.S. 920 (1980).

ning with *Bryan* [*v. United States,* 338 U.S. 552 (1950)], can hardly be characterized as models of consistency and clarity." *Burks v. United States,* 437 U.S. at 6. The Court further admitted, "to reach a different result [from the Court of Appeals] will require a departure from the [earlier] holdings." *Id.* To settle the matter the Court stated:

> [O]ur past holdings do not appear consistent with what we believe that the Double Jeopardy Clause commands. A close reexamination of these precedents, however, persuades us that they have not properly construed the Clause, and accordingly, should no longer be followed.

Id. at 12. Thus, the Court overruled "two separate lines of cases including one that was launched with considerable fanfare just three years ago." P. Westen & R. Dribel, "Towards a General Theory of Double Jeopardy," 1978 S.Ct.Rev. 81, 82 & n.8.

Obviously, the law in this area before *Burks* and *Greene*—especially insofar as whether seeking an appeal constitutes a waiver of the criminal defendant's double jeopardy rights—was on balance contrary to the newly announced constitutional rule.

Texas law for decades has mirrored federal law in this respect. In a long and unbroken line of cases implementing Tex. Code Crim. Proc. Ann. art. 44.25, and its statutory predecessors, the Texas Court of Criminal Appeals has held that a defendant might be retried for the same offense following a reversal for insufficient evidence.[6] Thus, under *Robinson v. Neil,* good faith

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6. After *Burks* and *Greene* the Court of Criminal Appeals held Article 44.25 unconstitutional to the extent of conflict with decisions of the United States Supreme Court. *Johnson v. State,* 571 S.W.2d 4, 6 n. 2 (Tex.Crim.App. 1978).

reliance by Texas law enforcement authorities is not only shown, but cannot seriously be questioned.

Clearly, good faith detrimental reliance—*i.e.*, prejudice—could well have been a reality in many cases such as Bullard's, and in two ways. First, for example, if Bullard or others similarly situated, might have been tried upon other charges following their first convictions, but the State in good faith believed that they might also validly be retried upon the same charge for which a reversal of the conviction had been obtained, then prejudice or detrimental reliance would be shown. Applying this concept to the punishment stage of trial, the prosecution might have had other cases to pursue against Bullard in order to increase his punishment. But the prosecution could not reasonably foresee the constitutional difficulty with Bullard's life sentence and, through no fault of the State, Bullard cannot now be retried for any of such charges, the applicable statutes of limitations having long ago expired.

Significantly, the record reflects that possibility has become reality in Bullard's particular case. The affidavit of W.T. Westmoreland, Chief, Appellate Section, Dallas District Attorney's Office (J.App.38), states that in his office, as well as in many others in Texas, there are frequently multiple charges or indictments pending against particular criminal defendants. Further, "It is a common practice in this office and others to dismiss those other charges if one is prosecuted successfully." *Id.*

The affidavit and supporting documents further attest as follows:

> In this case, our records show that there were three felony indictments against Bullard in Dallas County in 1975. In addition to the indictment for theft resulting in a life-sentence,

> there were pending indictments for burglary of a habitation and burglary of a vehicle, both felonies. These indictments were dismissed after the theft case was prosecuted to an apparently successful conclusion.[7]

Id.

Second, there are many reasons why there might have been additional evidence that could have been introduced at Bullard's trial—even at the punishment phase—but that was excluded for a variety of reasons. *See,* footnote three, *supra.* Or Bullard might have been re-endicted and retried as a habitual offender with *different* prior convictions alleged for enhancement. The State should not be deprived of this evidence or proof because of a strategic judgment founded upon a good faith, but erroneous, view of the law.

The Court of Appeals erroneously rejected this analysis. The court admitted that the proper analysis is far from clear:

> "[T]he Court [in *Robinson v. Neil*] did not expound to any great length on whether ruling implicating the double jeopardy clause should always be retroactive and if not under what circumstances they should be retroactive."

Bullard v. Estelle, 665 F.2d at 1364, App. C-27. The court then proceeded to fashion in effect a per se rule of retroactivity by finding detrimental reliance by the State irrelevant and, alternatively, nonexistent in this case. *Robinson v. Neil,* however, plainly leaves the way open to consider prejudice to the State, provided that

7. The record in this case reflects that Respondent Bullard has an extensive criminal history, having been arrested and convicted many times, often for felonies.

such reliance was in good faith. The Court of Appeals cited a Texas case, *Elizalde v. State*, 507 S.W.2d 749 (Tex.Crim.App. 1974), for the proposition that the Texas courts had previously embraced the principle of *Burks* and *Greene*. *Elizalde* held, however, only that where *illegally admitted evidence* was used at punishment, that evidence could not be re-introduced at the second punishment hearing. *Elizalde*, moreover, involved no constitutional issue whatsoever, but only the application of state law.

The Court of Appeals' holding that Petitioner failed to show prejudice is equally unpersuasive. The court in effect held that the State should not be heard to complain of prejudice where it had already had one opportunity to muster its proof. There was almost no discussion of Petitioner's precise claims of prejudice.

This Court plainly stated in *Brown v. Louisiana*, 447 U.S. 323, 327 (1979):

> "[I]t is clear that resolution of the question of retroactivity does not automatically turn on the particular provision of the Constitution on which the new prescription is based."

Yet the holding of the Court of Appeals in this case tends toward that precise result.

It should be emphasized that Respondent Bullard does not present a case in which doubt has been cast upon the factual accuracy of either the guilty verdict in his first trial or the punishment verdict in his second hearing. In *Ivan V. v. City of New York*, 407 U.S. 203 (1972) [quoted and emphasis added in *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977)], the Court stated as follows:

> Where the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs the truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule has been given a complete retroactive effect. Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has suffered to require prospective application in these circumstances. [citations omitted].

The major purpose of double jeopardy doctrine is not to protect the integrity of the fact-finding process: instead, it is to preclude the State from harassment of an individual by repeated attempts to incarcerate him. *Benton v. Maryland,* 395 U.S. 784, 795-96 (1969); *Green v. United States,* 355 U.S. 184, 187-88 (1957). Indeed, it is fundamental to principles of double jeopardy that it is preferable that a guilty man go free than be subjected to a forbidden second prosecution.

For these reasons, a question as to the accuracy of the guilty verdict based upon legally insufficient evidence is a sound basis for ordering an acquittal upon direct appeal from such a verdict. Perhaps it is even a sound basis for applying *Burks* and *Greene* to the punishment stage of a criminal trial. In Bullard's case, however, any such question has been obviated by his subsequent resentencing hearing and the presentation of virtually the same evidence but in a procedurally correct manner. In any event, there is no longer any question whatsoever as to the correct factual basis of his life sentence, whether such a question is raised in terms of the "insufficiency" of the evidence or the correction of trial-type error.

Simply stated, it is no longer possible to prevent Bullard's second sentencing hearing—and it never was. Following the Court of Criminal Appeals' initial reversal, Bullard stood validly convicted, but without a valid punishment. Accordingly, a second punishment hearing *had* to be held to determine Bullard's proper punishment, regardless of the range from which it might be selected. To hold *Burks* and *Greene* retroactive would mean that Bullard and others similarly situated must undergo yet a third punishment hearing.

To the extent that principles relating to double jeopardy are designed to spare a criminal defendant from the hardship, financial and emotional, of multiple proceedings—ordinarily, multiple prosecutions—that purpose simply is not served in this case. The sole benefit sought by Bullard is to reduce punishment. That result is not one ordinarily considered to ba a valid goal of the double jeopardy clause.

For these reasons, no reasonably imaginable analysis can militate in favor of a holding that *Burks, Greene,* and *Bullington* are retroactive; if *any* double jeopardy decision should be prospective only, this is it. Accordingly, Petitioner suggests that these cases may be held retroactive only by doing what the Court of Appeals erroneously denied it was doing, *i.e.*, establishing a per se rule that *all* double jeopardy decisions are retroactive. To say that that result follows from the clause's purpose—to prevent a second trial—is to embrace precisely a per se rule. Indeed, some members of this Court recently concurred in a dictum that suggested such a rule in a Fourth Amendment case, *United States v. Johnson*, 50 U.S. L.W. 4742, 4745, No. 80-1608 (U.S., June 21, 1982), although also cautioning that the Court meant to "express no view on the retroactive application of decisions construing any constitutional provision other than the Fourth Amendment." *Id.* at 4748-49.

Interestingly, even the purported rationale of the per se rule is inapplicable to this case. The rationale is that a second trial barred by double jeopardy principles is somehow void ab initio, even if the voidness is only discovered years later when a court recognizes the underlying double jeopardy principle for the first time. To apply the principle retroactively is to hold the entire second trial void.

But the Court cannot hold Respondent Bullard's second trial void. The only possible error is solely as to punishment. To invalidate his life sentence as void ab initio is to leave him with *no* sentence. It is conceded by all that if one of his prior convictions were unavailable for enhancement, he would be subject to a sentence of not less that two nor more than twenty years, a fine not to exceed $10,000, or both. Tex. Penal Code Ann. §§12.33, 12.42 (a). Bullard would be entitled to a new punishment hearing at which he would enjoy the benefit of discretionary sentencing.

Therefore, a new sentencing hearing is unavoidable. Even if the Court were inclined to adopt a per se rule of retroactivity for all double jeopardy decisions, there is no reasoned basis for applying such a rule in this case, which involves only punishment.

CONCLUSION

For these reasons, Petitioner respectfully prays that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

W. J. ESTELLE, JR., Director, Texas Department of Corrections,
Petitioner

v.

CHARLES EDWIN BULLARD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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Tex. Code Crim. Proc. Ann., Art. 12.01 2

Tex. Penal Code Ann., § 12.42(d) 4

MISCELLANEOUS:

18 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure*, §4478 13

Restatement (Second), Judgments 13

R. Casad, *Res Judicata In A Nutshell* (1976) 10

Vestal, *Criminal Prosecutions: Issue Preclusion and Full Faith and Credit*, 28 Kansas L. Rev. (1974) 12

Westen, *Death and Double Jeopardy*, 25 Law Quadrangle Notes (Spring 1981) 11

Westen, *The Three Faces of Double Jeopardy*, 78 Mich. L. Rev. (1980) 10

STATEMENT OF THE CASE

Respondent does not disagree with the Statement of the Case as presented by the Petitioner, but wishes to call to this Court's attention one item therein mentioned that needs amplification.

At page 6 of Petitioner's Brief, he states:

> At the time of the remand, the record reflects that the district attorney's office in Dallas County had several other felony indictments pending against Bullard for burglary of a habitation and burglary of a vehicle, both felonies. (Joint Appendix, hereinafter "J.App.," 38.) After the court conducted a new sentencing hearing on March 26, 1976, free of any infirmity and resulting in another life sentence, these other indictments were dismissed in accordance with the district attorney's ordinary practice. (J.App. 38).

The way this information became "part of the record" was by Petitioner attaching it as an exhibit to his Motion for New Trial after Judge Higginbotham had entered his memorandum order granting relief.

As such, it has never been subject to confrontation or cross-examination by Respondent.

The statute of limitations for burglary in Texas is five years. Tex. Code Crim. Proc. Ann., Art. 12.01. Consequently, prosecution for those offenses was still legally viable at the time of Judge Higginbotham's order granting relief.

For whatever reason, the State at that time chose not to pursue those cases, but rather to appeal the order granting relief.

Petitioner should not now be permitted to claim prejudice as a result of his own negligence.

SUMMARY OF THE ARGUMENT

A.

The rationale of *Bullington v. Missouri* is on all fours with Respondent's cause. The only distinction is that *Bullington* was a death penalty case, and that should be a distinction that does not make a constitutional difference. Once the state has had a full and fair opportunity to litigate *any* fact upon which it has the burden of proof beyond a reasonable doubt, its failure to do so should forever bar its ability to litigate the issue anew.

Amicus would have this Court fashion a contemporaneous objection rule and insert it into the Texas Code of Criminal Procedure. There may be a case someday arising from a jurisdiction which requires a contemporaneous objection, and Amicus' arguments would be persuasive, but this is not the case.

Petitioner's reliance on *United States v. DiFrancesco* is misplaced, as *DiFrancesco* belongs to the *North Carolina v. Pearce* line of cases which do not prohibit resentencing, while Respondent's situation falls into the *Ashe v. Swenson, Burks v. United States,* collateral estoppel, res judicata line of Double Jeopardy cases that do preclude resentencing.

But, Fifth Amendment considerations aside, the general law of res judicata should be all the law Respondent needs to prevail. Once a party has had a full and fair opportunity to litigate an issue, he should not be given repeated attempts to "get it right." "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect a liability in debt." *United States v. Oppenheimer,* 242 U.S. 85, 87 (1916).

B.

The question of the retroactivity of *Burks, supra,* seems foreclosed by this Court's pronouncement in footnote ten of *Tibbs v. Florida,* that:

> We have applied Burks to prosecutions that were not yet final on the date of that decision. See *Hudson v. Louisiana,* 450 U.S. 40, 67 L.Ed.2d 30, 101 S.Ct. 970 (1981). *Tibbs, supra,* at L.Ed.2d 658.

It follows from that language, that *Bullington,* a child of *Burks,* should also be applied retroactively.

The question that remains is whether the retroactive application of *Burks* should apply to Respondent, whose case reaches this Court on collateral attack, rather than direct review, his conviction for state purposes having become "final" prior to the decision in *Burks*.

Respondent asserts that under any analysis, the answer to that question is "yes." *Robinson v. Neil,* 409 U.S. 505 (1973); *Desist v. United States,* 394 U.S. 280 (1969) (Harlan, J. dissent); *United States v. Johnson,* _____U.S. _____, 73 L.Ed.2d 202, 102 S.Ct._____(1982).

ARGUMENT

A.

BURKS V. UNITED STATES, 437 U.S. 1 (1978), *GREENE V. MASSEY,* 437 U.S. 19 (1978), and *BULLINGTON V. MISSOURI,* 451 U.S. 430 (1980), ARE APPLICABLE TO TEXAS HABITUAL OFFENDER SENTENCING PROCEDURES.

The correct reading of this Court's decisions in the cases of *Burks v. United States,* 437 U.S. 1 (1978), *Greene v. Massey,*

437 U.S. 19 (1978) and *Bullington v. Missouri*, 451 U.S. 430 (1980) mandates affirmation of the decision below. Properly understood, the Texas habitual offender procedure as implicated here posits precisely the constitutional issues which have been addressed by the Court and disposed of seriatim in *Burks*, *Hudson v. Louisiana*, 450 U.S. 40 (1981), *Bullington*, and most recently *Tibbs v. Florida*, _____U.S. _____, 72 L.Ed.2d 652, 102 S.Ct._____(1982).

In this portion of the brief, Respondent will formulate the Texas procedure, distill the double jeopardy law as it applies to sentence enhancement proceedings, and distinguish the authority relied on by Petitioner and Amicus.

Under Texas' bifurcated trial system at the punishment phase of an habitual offender prosecution the State has the burden of proving beyond a reasonable doubt [*Jackson v. State*, 571 S.W.2d 1 (Tex. Crim. App. 1978)] that:

1. the person named in both enhancement counts is in fact the defendant [*Bullard v. State*, 533 S.W.2d 812 (Tex. Crim. App. 1976)];
2. the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final [Tex. Penal Code Ann., §12.42(d)]; and
3. that the offenses alleged in the enhancement counts are felonies. [*Ex Parte Smith*, 548 S.W.2d 410 (Tex. Crim. App. 1977)] (applicable only to out-of-state or federal convictions alleged for enhancement).

The Texas Court of Criminal Appeals has recently explained the significance of the foregoing criteria in a case quite similar to the case at bar. In *Cooper v. State*, 631 S.W.2d 508 (Tex. Crim. App. 1982), the court en banc considered the opinion of the Court of Appeals for the Fifth Circuit in this case. After

expressly acknowledging that constitutional interpretations of the Fifth Circuit are not binding on the Texas Court of Criminal Appeals, *Flores v. State*, 487 S.W.2d 122 (Tex. Crim. App. 1972), the court held that the failure of the State to prove beyond a reasonable doubt each element requisite for enhancement precluded the State's availing itself of a "second opportunity to prove the original allegations." *Cooper, supra,* at 514. That is, the State's failure to satisfy the habitual offender statute's requirements does preclude relitigation of the enhancement issues in Texas in light of this Court's opinion in *Bullington*. Since the Court of Criminal Appeals decided *Cooper* on Fifth Amendment considerations, its opinion is, of course, not binding on this Court.[1] But *Cooper* should lay to rest forever Petitioner's constant attempt to characterize the State's failure of proof as "trial type error" (Petitioner's Brief, p. 10).

> We would note that the case before us is not an instance in which the State has made an allegation and the proof simply shows a variance. Here, however, the State had alleged and had to prove that the 1968 conviction was for an offense occurring after the 1965 conviction. This it failed to prove. *Cooper, supra,* at 513.

So, *Cooper,* rather than being ". . . totally irrelevant to any issue before the court," (Petitioner's Brief, p. 10, ftn. 2) is dispositive of the question of the meaning of the Texas Court of Criminal Appeals use of the words "insufficient evidence" in *Bullard v. State,* 533 S.W.2d 812 (Tex. Crim. App. 1976).

> Absent a conflict with the Due Process Clause . . . (a state) court's construction of its prior opinion binds this Court. (parenthetical added). *Tibbs v. Florida, supra,* at

[1]The four concurring judges in *Cooper* would have gone further, and decided the case on *Texas* Constitutional grounds as well. *Cooper, supra,* at 515.

L.Ed.2d 664. See also, *Mullaney v. Wilbur*, 421 U.S. 684 (1975):

> This court . . . repeatedly has held that state courts are the ultimate expositors of state law . . . and that we are bound by their constructions except in extreme circumstances . . . *Mullaney, supra*, at U.S. 691. (citations omitted).

Similarly, any suggestion that this Court should choose to insinuate itself into Texas' law of criminal procedure is improvident. Amicus would have this Court mandate a contemporaneous objection rule, similar to Federal Rules of Criminal Procedure, Rule 29, into the Texas Code of Criminal Procedure. This the Texas Legislature has not seen necessary to require, nor has the Texas Court of Criminal Appeals deemed necessary in the area of insufficient evidence.

The analysis posited by the Soliciter General would impose the type of affirmative obligation on the defendant to object to the sufficiency of the evidence which courts construing Rule 29 have assumed. See, e.g., *United States v. Meneses-Davila*, 580 F.2d 888, 896 (1978), in which the Fifth Circuit concluded that because the defendant failed to renew its objection to the sufficiency of the evidence at the conclusion of defendant's case, the "review on appeal involves merely a determination of whether affirmance of the conviction would entail a 'manifest miscarriage of justice'," citing *United States v. Juarez*, 566 F.2d 511, 512-13 (5th Cir. 1978). The State of Texas has never adopted a rule providing such a dual standard of review which effectively penalizes the defendant for his failure to make a timely objection. This Court should not feel compelled to fashion such a rule at the insistence of Amicus. It should also be noted that the decision in *Jackson v. Virginia*, 443 U.S. 307 (1976) puts the effectiveness of the federal dual standard of review in serious question.

Additionally, the reliance of Amicus on the recent opinion of the Court of Appeals for the Tenth Circuit in *Linam v. Griffin*, _____ F.2d _____ (1982) is not well-founded. In *Linam* the prosecution had in its possession, but failed to introduce at the enhancement proceeding evidence showing the dates of the commission of the prior felonies. The prosecution neither had reason to know that such a proffer would be held to be prerequisite to enhancement nor could it be said that the defendant could properly have relied in any way on the result "mandated" by the State's failure to introduce all of the proper evidence. The double jeopardy value of the defendant's interest in repose was not compromised in *Linam* the way it was in the instant case. Respondent had every reason to expect the consequences which flow from the prosecution's failure to support its burden of proof; Linam could not. Therefore, it is appropriate to conclude that the defendant in *Linam* would not be entitled to the same deference as is Respondent. Additionally, the prosecution in *Linam* had no reason to foresee the result reached by the State appellate court. Therefore, it would not have been appropriate to penalize the prosecution; quite simply, in *Linam* the prosecution did not get a second bite of the *same* apple.

Finally, striped of all its verbiage, Amicus' argument in the final analysis is that it should be the duty of the defense attorney to assist in helping the prosecution convict his client. The ethical absurdity of that proposition deserves little more comment. Texas does not require the objection to be made, and Respondent does not see how this Court can fashion a procedural rule that the Texas Legislature has not deemed necessary to write.

Turning back to the applicability of *Burks*, et. al., to the Texas habitual offender phase of the trial, *Burks* holds "that the Double Jeopardy Clause precludes retrial 'once the reviewing court has found the evidence legally insufficient' to support

conviction." *Tibbs, supra,* at L.Ed.2d 660. The *Burks* opinion contains no suggestion, indeed Petitioner is unable to cite any suggestion, that the holding of the case turns on the fact that the finding of insufficient evidence in *Burks* attended the determination of guilt or innocense rather than the determination of proper sentence. To eviscerate *Burks* as Petitioner suggests might, indeed, compromise the position of Respondent in this appeal. On the other hand, it is not at all clear that the double jeopardy principles formulated in *Bullington, supra,* would be so compromised as to mandate reversal of the Fifth Circuit's decision. Whether Petitioner is comfortable with the application of *Burks* to sentencing proceedings or not, it is inappropriate to relitigate that issue here. In *Bullington, supra,* this Court has already determined that it can in the appropriate case. It is similarly inefficacious to assert the applicability of *United States v. DiFrancesco,* 449 U.S. 117 (1980), when this Court has already concluded that *Bullington* provides the proper standard of analysis in a Bullington-like situation such as that presented in the instant controversy. Certainly *DiFrancesco* acknowledged a less exacting double jeopardy standard with regard to sentencing procedures, but *DiFrancesco's* two-level analysis should be seen as justifying a result such as that reached in *Linam, supra,* not the result argued for by Petitioner here.

The most glaring shortcoming of Petitioner's argument is his failure to come to terms with the meaning of *Bullington*. That failure becomes manifest in Petitioner's analysis leading to his conclusion that *DiFrancesco,* rather than *Bullington,* is the appropriate reference for disposition of this appeal. *Bullington* affords constitutional significance to the implicit acquittal theory, made applicable to appellate reversals for insufficient evidence in *Burks*. But Petitioner would have this Court dismiss *Bullington* as a death penalty case and no more. Once again, however, there is no suggestion available for Petitioner to cite

from this Court's opinion in *Bullington* which supports such a narrow reading of the opinion. If a simple rule can be distilled from *Ashe v. Swenson*, 397 U.S. 436 (1970), *Burks*, *Greene*, *Hudson* and *Bullington*, *supra*, it is that the State is barred by the Double Jeopardy Clause from relitigating *any* fact upon which it has the burden of proof beyond a reasonable doubt, once a jury or appellate court determines it has failed in that burden.

The Court of Appeals presented Respondent's case as a conflict between *DiFrancesco*, on the one hand and *Bullington*, on the other hand.

In Respondent's judgment, the real paradox in his case is not between *DiFrancesco* and *Bullington*, but between *North Carolina v. Pearce*, 395 U.S. 711 (1969), on the one hand, and *Ashe v. Swenson*, *supra*, on the other hand. *Pearce* stands for the proposition that the government upon retrial following a reversed conviction may relitigate a defendant's sentence for the purpose of securing a higher sentence — despite the fact that the original sentence was itself valid and lawful. Yet *Ashe* (and its progeny, *Burks* and *Greene v. Massey*) stand for the proposition that the government may not relitigate an issue that the government had a full and fair opportunity to litigate the first time around. The two lines of cases seem irreconcilable. The government in *Pearce* possessed — and exercised — a full and fair opportunity to secure at the close of the defendant's original trial the sentence it believed he deserved on the evidence as it then existed. *Ashe* and *Burks* both seem to declare that one full and fair opportunity is enough, and that the government should not have a "second bite of the apple" unless it can point to some defect in the original proceeding. Yet the government in *Pearce* was allowed a "second bite of the apple" of precisely the kind that *Ashe* and *Burks* seem to preclude.

How can the two lines of cases be reconciled? In Respon-

dent's judgment, there are only two possibilities, and both work in his favor. First, it might be argued that the principles of res judicata and collateral estoppel reflected in *Ashe* and *Burks* do not apply to the "continuing jurisdiction" of criminal sentencing. Thus, an analogy might be drawn between criminal sentencing, on the one hand, and child custody decrees, on the other hand. The principles of res judicata and collateral estoppel do not apply to child custody decrees, because as equitable decrees, they are deemed to remain forever open for reevaluation in light of changed circumstances and facts. *See* R. Casad, *Res Judicata In A Nutshell* §5-34 at p. 175 (1976). A party to such a judgment (say, a wife) is not precluded from relitigating child custody because, technically, she is not relitigating facts as they existed at the time of the original decree, but rather litigating the new facts and circumstances as they exist now. The same may be true of criminal sentencing in some jurisdictions. Just as many states expect their parole boards and probation offices to assess and reassess a defendant's sentence in light of his continuing conduct and progress, states may wish sentencing judges to be able to reassess — either upward or downward — a defendant's sentence in light of changed circumstances. In that event, the constitutional principles of res judicata and collateral estoppel reflected in *Ashe* and *Burks* would not apply, any more than the constitutional principles of Full Faith and Credit apply to the enforcement of child support decrees. *See Kovacs v. Brewer*, 356 U.S. 604 (1958); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947). That might explain why the state in *Pearce* was allowed to seek a higher sentence upon retrial than was imposed originally: because, so the argument goes, the state was not relitigating facts as they existed at the time of the original sentence, but rather was presenting new information regarding sentence length.

The foregoing argument is plausible in theory, but it is hard to

reconcile with the actual situation in *Pearce* because there was nothing in *Pearce* to suggest that the state in fact regarded criminal sentences as "continuing" in the same sense as child custody decrees. In any event, however, even if that had in fact been the case in *Pearce*, it was clearly *not* the case in Respondent's situation. The factual basis for the higher sentence in Respondent's case was not new information about the defendant that had come into existence since the original sentence, but rather information about occurrences that were complete and final at the time of the original trial. Given the aforementioned rationale for treating the *Pearce* sentence differently from *Ashe* and *Burks*, there is nothing in the sentence determination in Respondent's case that would justify giving the state "a second bite of the apple." *See* Westen, *Death and Double Jeopardy*, 25 Law Quadrangle Notes, No. 3, p. 33, 35 (Spring 1981).

Second, it might be argued that *Ashe's* constitutional principles of res judicata and collateral estoppel do not apply to situations in which the facts at issue *have to be relitigated anyway*. That appears to have been the case in *Pearce*. The judge at the second trial in *Pearce* did not conduct a separate sentencing hearing based on separate presentations of evidence and separate legal standards. Instead, having heard evidence at the second trial on the underlying criminal charge, he imposed a new sentence on the basis of everything he by then knew about the defendant — information that included what he had to hear anyway in connection with his presiding on the merits of the case. A rule like *Ashe* or *Burks*, if applied to *Pearce*, would not serve the ordinary res judicata purposes of conserving judicial time, preventing harassment, and avoiding evidentiary inconsistencies, because the evidence bearing on the defendant's sentence was part and parcel of the evidence bearing on his guilt or innocence, and the latter evidence had to come in anyway,

one way or the other: *See* Westen, *The Three Faces of Double Jeopardy*, 78 Mich. L. Rev. at 1059-62 (1980). Even so, the rationale has no relevance at all to Respondent, because the evidence of prior crimes in *Bullard* was *not* evidence that had to come in anyway in connection with the merits of the charge. On the contrary, unlike the situation in *Pearce*, the trial judge in Respondent's case had to conduct a separate hearing with new evidence and independent legal standards to make the determination of recidivism. A rule of res judicata or collateral estoppel might have been superfluous in *Pearce* because evidence bearing on the defendant's sentence was going to be litigated, anyway, one way or another, as part of the state's case in chief; but it would *not* have been superfluous in Respondent's case because it would have fully served it preclusive purposes — to conserve judicial time, prevent harassment, and avoid the appearance of judicial inconsistency. Since the *Pearce* exception to the principles of res judicata and collateral estoppel does not apply in the instant case, the latter principles of preclusion should be given full effect in Respondent's situation.

Finally, Fifth Amendment considerations aside, there is a more general and broader line of authority in which it is obvious that *Pearce* is the exception, rather than the rule, and that line of authority is the *law of res judicata:* the principle that once a party has had a full, fair, and valid opportunity to litigate an issue, he should not be allowed to compel his opponent and the judicial system to go through the same thing all over again.

The principles of res judicata are not limited to criminal cases, though they do apply there. *See* Vestal, *Criminal Prosecutions: Issue Preclusion and Full Faith and Credit*, 28 Kansas L. Rev. 1-24 (1974); *Standefer v. United States*, 447 U.S. 10, 21-25 (1980), *Burks, supra*. They are general principles of law applicable in all settings — civil, criminal, and administrative. *See United States v. Oppenheimer*, 242 U.S. 85, 87-89 (1916)

(per Holmes, J.). The best proof is the position of the new Restatement (Second) of Judgments. The Restatement attempts to define the "law" governing all judgments (civil and criminal) in all courts (state and federal). This "law" of preclusion favors Respondent's cause and puts the burden on Petitioner to justify an exception.

Moreover, for purposes of the general principles of preclusion, it is irrelevant that *Bullard* arises in the context of a retrial following a reversed judgment. The same principles apply per the doctrine of the "law of the case." 18 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 4478, pp. 788-801 (and from section 13 of the Restatement).

This does not necessarily mean that *Pearce* was wrongly decided.[2] It does mean, however, that in contrast to *Burks* and *Ashe*, *Pearce* has to be "explained." It means that *Pearce* is a noticeable exception to the venerable doctrine of res judicata and, as such, remains suspect. As between *Pearce* and *Burks*, it is *Pearce* that calls for an explanation — not *Burks*. There is only one feature of *Pearce* that might arguably justify excepting it from the general principles of "law of the case," *i.e.*, that the factual issues pertinent to the defendant's sentence on retrial had to be retried anyway in connection with his retrial on the merits of the charge. That, obviously, is not true of cases like Respondent's (or *Bullington*) in which sentencing is entirely bifurcated.

Why should Mr. Bullard be singled out and denied the benefits of principles of res judicata that every other litigant, from the highest to the lowest, otherwise enjoys?

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[2] *DiFrancesco*, of course, is perfectly consistent with res judicata because the original sentence was not legally "valid."

B.

BURKS V. UNITED STATES, 437 U.S. 1 (1978), *GREENE V. MASSEY*, 437 U.S. 19 (1978), and *BULLINGTON V. MISSOURI*, 451 U.S. 430 (1980), SHOULD BE HELD RETROACTIVE.

In *Tibbs, supra,* this Court stated:

> We have applied Burks to prosecutions that were not yet final on the date of that decision. (citation omitted) *Tibbs, supra,* at L.Ed.2d 658, Ftn. 10

While that language was not essential to reaching the result, it is historically accurate. *Hudson, supra*. Respondent has heretofore taken the position that *Burks* had already been held retroactive the same day in *Greene v. Massey, supra,* but that argument is no longer necessary. Therefore, the question of retrospective versus prospective application seems foreclosed against Petitioner as far as *Burks* and *Greene* are concerned. *Bullington v. Missouri, supra,* is a direct descendant of *Burks*, and Respondent would submit that there is no rationale for treating *Bullington* any differently than *Burks*.

If Respondent may be permitted to presage the concern of the Court on this issue, it should be: given that *Burks* is retroactive to prosecutions not yet final on the date of its decision, does it apply retroactively to a person such as Respondent who reaches this Court by way of collateral attack?

Respondent could take the position that while his conviction was "final" for State purposes prior to the decision in *Burks*, it was not "final" for federal purposes. U.S. Const. Art. I, § 9(2); 28 U.S.C. § 2254. Respondent filed his original federal writ of habeas corpus on April 17, 1978, (J.APP. 1), two months before this Court's decision in *Burks*. His case was thus still subject to review by this Court at the time of the *Burks* decision.

However, that would be straining the above cited language in *Tibbs*, and Justice Harlan's reasoning adopted by the Court in *United States v. Johnson*, _____ U.S. _____, 73 L.Ed.2d 202, 212, 102 S.Ct. _____ (1982).

Therefore, Respondent will resort to traditional retroactivity analysis and attempt to delineate why he should be afforded the relief requested.

Respondent takes issue with Petitioner's characterization of *Burks* as being a ". . . departure from past decisions of this Court." (Petitioner's Brief, p. 19). As Respondent contended in Part A, *supra*, *Burks* is a progeny of *Ashe v. Swenson*, *supra*, whether acknowledged as such in *Burks* or not. As the Court stated in *Ashe:*

> 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *Ashe*, *supra*, at U.S. 443.

Burks did little more than take this underlying principle and apply it to a finding by an appellate court of insufficient evidence. So, on the one hand Respondent's case fits into the first classification of retroactivity set out in *United States v. Johnson*, *supra*.

> First, when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retroactively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way. *Johnson*, *supra*, at L.Ed.2d 213.

The language "To reach a different result will require a departure from those holdings" (*Burks*, *supra*, at U.S. 10)

picked out and isolated by Petitioner as evidence that *Burks* was a genesis is misleading. To the extent that that language referred to dispositions where the defendant requested a *new trial* versus a motion for *judgment of acquittal*, Petitioner is correct. "To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled." *Burks, supra*, at U.S. 18. The cental issue of the *Burks* holding is that ". . . it should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient." *Burks, supra*, at U.S. 11. (emphasis original).

> Since we necessarily afford absolute finality to a jury's *verdict* of acquittal — no matter how erroneous its decision — it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty. *Burks, supra*, at U.S. 16 (emphasis original).

And, "it is difficult to conceive" how that notion could be such a radical break from the past.

On the other hand, if *Burks* is applicable to a Texas habitual offender proceeding, then Respondent's case fits also into the third category enunciated in *Johnson, supra*.

> Third, the Court has recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place. *Johnson, supra*, at L.Ed.2d 214.

If this Court finds *Burks* applicable, then at his second punishment hearing the trial court had no constitutional authority to resentence Respondent as an habitual offender.

Finally, contrary to the "prejudice" alleged by Petitioner (see Statement of the Case, *supra*), at least one of the two burglary indictments pending against Respondent was still le-

gally viable at the time of Judge Higginbotham's order granting relief. Petitioner should not now be permitted to claim prejudice because he chose to appeal the order rather than pursue the legally viable case against Respondent in state court. And, as pointed out by the Texas Court of Criminal Appeals in *Cooper, supra,* the State would not have been precluded from using the *same two* prior convictions alleged in the original indictment in the new burglary indictment.

So, it would seem that under any test, Respondent should be entitled to the relief requested unless his status as a habeas corpus petitioner stands in the way.

Justice Harlan, in his dissent in *Desist v. United States,* 394 U.S. 244 (1968) raised for the first time the question of the availability of retroactive applications of "new" constitutional rules to habeas petitioners, and this Court made passing reference to it in *Johnson, supra.*[3]

However, Justice Harlan's distinction between the retroactivity analysis in direct and collateral appeals has never been adopted by this Court. Furthermore, nothing in the instant case suggests that it should be treated differently from prior decisions of this Court. Examples of retroactive applications in Fifth Amendment habeas cases are available. *North Carolina v. Pearce, supra,* retroactively applied *Benton v. Maryland,* 395 U.S. 784 (1969) (decided the same day as *Pearce*) to a habeas petitioner. *Robinson v. Neil,* 409 U.S. 505 (1973) retroactively applied *Waller v. Florida,* 397 U.S. 387 (1970) to a habeas petitioner. Unlike Respondent, who filed his habeas application *before* the decision in *Burks,* the petitioner in *Robinson* filed his second federal writ *after* the decisions in *Benton* and *Waller,*

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[3] "Second, because respondent's case arises on direct review, we need not address the retroactive reach of our Fourth Amendment decisions to those cases that still may raise Fourth Amendment issues on collateral attack." *Johnson, supra,* at L.Ed.2d 222.

supra. Finally, although the above list is not meant to be exhaustive, this Court has already applied *Burks* retroactively to a habeas petitioner in *Greene v. Massey, supra*. A further review of Justice Harlan's dissent in *Desist* reflects that not once in any of his examples was a double jeopardy case discussed. His examples dealt with constitutional "procedural" rules, e.g., electronic eavesdropping, line-ups, right to trial by jury and self-incrimination.[4] To the extent that these "new" procedural rules might justify treating a habeas petitioner differently, the same logic does not apply to a double jeopardy question. The values implicated in the Double Jeopardy Clause are simply too fundamental. If this Court determines that a particular factual situation falls within the Fifth Amendment prohibition, then all defendants similarly situated should benefit from that rule, since they *never* should have been retried (*Burks, supra; Ashe, supra*) or subjected to resentencing (*Bullington, supra*).

The opinion in *Abney v. United States*, 431 U.S. 651 (1977) is indicative of the "extraordinary" measures this Court is willing to let a defendant take in order to assert a double jeopardy claim.

> Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution . . . he is contesting the very authority of the Government to hale him into court to face trial on the charge against him. *Abney, supra*, at U.S. 659.

This Court's willingness to in effect shut down a trial while an

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[4]*Katz v. United States*, 389 U.S. 347 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Duncan v. Louisiana*, 319 U.S. 145 (1968); and *Malloy v. Hogan*, 378 U.S. 1 (1964).

interlocutory appeal takes place is ample evidence that a claim of double jeopardy takes precedence over the orderly administration of justice.

Similarly, a double jeopardy claim should be reviewable by habeas corpus.

CONCLUSION

For these reasons, Respondent respectfully requests that the judgment of the Court of Appeals be in all things affirmed.

Respectfully submitted,

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STEVAS
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No. 81-1774

In the Supreme Court of the United States

OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, PETITIONER

v.

CHARLES EDWIN BULLARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether petitioner's resentencing to life imprisonment at a second habitual offender sentencing proceeding violated the Double Jeopardy Clause.

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INTEREST OF THE UNITED STATES

The decision in this case will further explicate the manner in which the Double Jeopardy Clause applies to sentencing and may also more generally illuminate the contours of the rule of *Burks* v. *United States*, 437 U.S. 1 (1978), restricting further proceedings after an appellate reversal for insufficient evidence. While there is currently no federal sentencing statute precisely like the Texas habitual offender sentencing scheme at issue here, there are federal statutes under which sentencing is dependent on certain factual findings, such as the dangerous special offender provision (18 U.S.C. 3575) at issue in *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), and the capital punishment scheme under the air piracy stat-

utes (49 U.S.C. 1473(c)). Moreover, a proper understanding of the extent to which double jeopardy principles do or do not generally restrict the power of courts to allow further proceedings to remedy deficiencies of proof is of equal significance to federal as to state prosecutions.

STATEMENT

1. Following a jury trial in Texas court, respondent was convicted of felony theft. Under the Texas bifurcated trial procedure (see Tex. Code Crim. Proc. Ann. Art. 37.07 (Vernon 1981)), a second hearing was then held on the issue of punishment. At this hearing, which was held before the judge pursuant to respondent's written election, the prosecution sought to prove that respondent had committed two prior felonies and thus was subject to a mandatory sentence of life imprisonment pursuant to the Texas habitual offender statute, Tex. Penal Code Ann. § 12.42 (Vernon 1974) (reprinted at Pet. App. C32 n.2). See Pet. App. C2; see also *Rummel* v. *Estelle*, 445 U.S. 263 (1980).

At the hearing, the prosecution introduced three exhibits. Exhibit No. 1 was a set of respondent's fingerprints taken on the day of the trial. Exhibits Nos. 2 and 3 were records of two prior felony convictions alleged in the indictment, No. C-70-6579-MN and No. D-7519-JI respectively. Each conviction record contained a set of fingerprints. Deputy Sheriff John Slovak, a fingerprint expert from the Dallas County Sheriff's Department, testified as follows:

> Q: (By Mr. Walker [Assistant District Attorney]) Deputy Cron, would you compare the —Deputy Slovak, excuse me—would you compare the prints that is [*sic*] on State's Exhibit No. 1 to the exhibit that is on State's Exhibit No. 2?

A: (By the witness [John Slovak]) Yes, sir, I did.

Q: O.K. Have you done that?

A: Yes, I have.

Q: I'll ask you if those prints were made by one [and] the same person?

A: Yes, sir, they were.

Q: Is there any doubt in your mind that those were made by anyone else other than the Defendant in this cause?

A: No, sir.

Q: Again, I'll ask, do those records indicate a Charles Edwin Bullard was convicted in Cause No. D-7519-JI?

A: Yes, sir.

Q: And also in Cause No. C-70-6579-MN?

A: Yes, sir.

Respondent did not object to the adequacy of the proof. The court then found that respondent was guilty of two prior felonies and sentenced him to life imprisonment. See Pet. 3-4.[1]

2. On direct appeal, the Texas Court of Criminal Appeals affirmed respondent's conviction. 533 S.W. 2d 812 (1976). The court reversed and remanded respondent's sentence, however, accepting respondent's contention that the State had not adequately proven that respondent had committed two prior felonies. The court explained (*id.* at 816):

> Deputy Slovak was not asked to compare the fingerprints he had taken of the [respondent] with those on State's Exhibit No. 3; at no time did Deputy Slovak testify that the fingerprints he had taken of the [respondent] were made by

[1] While these facts are taken from the State's petition, they appear to be undisputed. Respondent has adopted the Statement of the Case set out in the petition. Br. in Opp. 1.

> the same person whose fingerprints appeared on State's Exhibit No. 3. The State's evidence is therefore insufficient to identify the [respondent] as the defendant who was convicted in Cause No. D-7519-JI in Criminal District Court No. 2 in Dallas County. * * * Hence, the court erred in enhancing the punishment * * *.

The court then concluded that "the proper remedy is to set aside the life sentence and remand the case to the trial court for a new hearing or trial on the issue of punishment to be assessed by the court, at which time the State may again attempt to prove the prior convictions for the purpose of enhancing punishment." *Ibid.*

On remand, a fingerprint expert for the State testified that respondent's fingerprints matched the fingerprints contained in the records of the two prior felony convictions alleged in the indictment. In addition, respondent admitted that he was the same person who was convicted of those felonies. The trial judge found that respondent had committed the two prior felonies and again sentenced him to life imprisonment. The Texas Court of Criminal Appeals affirmed. 548 S.W. 2d 13 (1977). See *id.* at 22.

3. After exhausting his state court remedies, respondent sought habeas corpus relief in federal court. The district court held that the resentencing of respondent to life imprisonment after his original life sentence had been set aside on appeal for insufficient evidence violated the Double Jeopardy Clause, citing *Burks* v. *United States*, 437 U.S. 1 (1978), and *Greene* v. *Massey*, 437 U.S. 19 (1978) (Pet. App. A1-A16). The court ordered respondent discharged from custody. In a subsequent memorandum order, the court rejected the State's contention that *Burks* and *Greene* do not apply retroactively (Pet. App. B1-B5).

The court of appeals affirmed (Pet. App. C1-C41). Relying heavily on *Bullington* v. *Missouri*, 451 U.S. 430 (1981), the court held that the Double Jeopardy Clause applied to the Texas habitual offender sentencing proceedings and that *Burks* and *Greene* therefore barred the second sentencing proceeding (Pet. App. C4-C23). The court also concluded that *Burks* and *Bullington* applied retroactively (*id.* at C23-C31).

SUMMARY OF ARGUMENT

A. The court of appeals' decision that *Burks* v. *United States*, 437 U.S. 1 (1978), is applicable to the Texas habitual offender sentencing proceeding here turns on its conclusion that this case is controlled by *Bullington* v. *Missouri*, 451 U.S. 430 (1981), and distinguishable from *United States* v. *DiFrancesco*, 449 U.S. 117 (1980). This case does, however, differ from *Bullington* in several respects: it involves a proceeding that is more of a formality than a trial; it does not involve the death penalty; it involves sentencing by a judge, not a jury; and the sentencing inquiry is unrelated to the charged offense. On the other hand, sentencing under the Texas habitual offender statute is not informal and purely discretionary. In addition, like *Bullington* and unlike *DiFrancesco*, the prosecution here does not contend that the first sentencing proceeding was tainted by legal error prejudicial to it; hence, *res judicata* principles suggest that it is entitled to finality in the absence of some affirmative justification for redoing it. In our view, however, the proper disposition of this case does not depend on whether *Burks* applies to the Texas scheme because, assuming that *Burks* does apply, the Double Jeopardy Clause nevertheless does not bar the second sentencing proceeding under the spe-

cial circumstances of this case—*i.e.*, the nature of the "failure" of proof and the lack of a timely objection at trial to the sufficiency of the evidence.

B. In *Burks*, the Court held that the Double Jeopardy Clause prohibited the retrial of a defendant whose conviction was reversed on appeal for insufficient evidence. The Court reasoned that the appellate court's decision meant that the trial court should have granted the motion for a judgment of acquittal in the first instance, which would have precluded the possibility of a retrial. Accordingly, the Court concluded that the appellate court should have granted the same relief and directed the entry of a judgment of acquittal.

Burks does not necessarily suggest, however, that a retrial is barred when the insufficiency of the evidence is due to a reason other than the prosecution's inability to have sufficient evidence available for trial. For example, in *Linam* v. *Griffin*, No. 80-1532 (10th Cir. Aug. 9, 1982), the state appellate court, on Linam's direct appeal, had for the first time interpreted the New Mexico habitual offender sentencing statute to require proof of a fact not shown at the first proceeding. Allowing the prosecution, at a second proceeding on remand, to introduce evidence of this fact, which had been in its possession all along, was held not to constitute "government oppression" of the kind against which protection is afforded by the Double Jeopardy Clause.

Here, as in *Linam*, the prosecution had available to it sufficient evidence to prove its case at the first proceeding; only because of an oversight was sufficient evidence not introduced then. Thus, the principle underlying *Burks* (see 437 U.S. at 11) that the prosecution not be given an opportunity to muster additional evidence at a second proceeding is not

implicated here. The guiding principle of *Burks*, that the defendant is entitled on appeal to the relief that he should have received in the trial court, does not suggest that a retrial is barred here. For, unlike *Burks*, this is not a case in which the trial court wrongly rejected a motion by the defendant alleging that the prosecution had failed to prove its case. No such motion was made, and, if it had been, it would have been perfectly proper for the trial court to allow reopening of the record for the taking of additional evidence. See Tex. Code Crim. Proc. Ann. Art. 36.01 (Vernon 1981).

The trial court's failure to reopen the record to correct the omission is directly ascribable to respondent's failure to object to the insufficiency in the trial court. The Double Jeopardy Clause does not require that a defendant be able to avoid the introduction of all available evidence by "blindsiding" the prosecution in this fashion. Rather, the appellate court's remand here for a new proceeding, since it did nothing more than what the trial court could properly have done, achieved substantial justice without threatening any of the values safeguarded by the Double Jeopardy Clause and therefore did not violate that provision.

ARGUMENT

THE RESENTENCING OF RESPONDENT TO LIFE IMPRISONMENT AT A SECOND HABITUAL OFFENDER PROCEEDING DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

A. Introduction

The court of appeals held that the double jeopardy principles embodied in *Burks* v. *United States*, 437 U.S. 1 (1978), applied to the Texas habitual offender sentencing proceeding. In doing so, the court dis-

tinguished this Court's decision in *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), which held that the Double Jeopardy Clause did not bar a statutorily authorized prosecution appeal from a sentence that was an abuse of the trial judge's discretion. Rather, the court of appeals held that this case was analogous to *Bullington* v. *Missouri*, 451 U.S. 430 (1981), in which this Court held the Double Jeopardy Clause applicable to Missouri's trial-type capital punishment sentencing procedure and barred the State from seeking the death penalty at a retrial of a defendant whose conviction (for which he received a life sentence) was reversed on appeal. See Pet. App. C22-C23.

The Texas sentencing procedure at issue here is similar in material respects to the Missouri procedure involved in *Bullington*. Neither involves the relatively informal and standardless sentencing that is customary following most federal and state convictions;[2] rather, each entails a bifurcated trial with a separate sentencing proceeding before a factfinder, with the prosecution bearing the burden of proving certain facts beyond a reasonable doubt as a precondition to imposition of a more severe sentence.

Nevertheless, there are some significant differences between this case and *Bullington*. First, the Court characterized the Missouri proceeding as having "the hallmarks of the trial on guilt or innocence" (451 U.S. at 439), while an habitual offender sentencing proceeding like the one involved here, which turns on facts that are usually not subject to serious dispute,

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[2] The limited application of the Double Jeopardy Clause to that type of sentencing is evident from such decisions as *North Carolina* v. *Pearce*, 395 U.S. 711, 719-721 (1969), and *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973). See note 4, *infra*.

has been characterized as "a formality which bears little resemblance to a trial" (*Linam* v. *Griffin*, No. 80-1532 (10th Cir. Aug. 9, 1982), slip op. 13). Second, *Bullington* involved the imposition of the death penalty, and the "significant constitutional difference between the death penalty and lesser punishments" (*Beck* v. *Alabama*, 447 U.S. 625, 637-638 (1980)) arguably requires stricter double jeopardy protection where capital punishment is involved. See also *Corbitt* v. *New Jersey*, 439 U.S. 212, 216-217 (1978); *Lockett* v. *Ohio*, 438 U.S. 586, 604-605 (1978) (opinion of Burger, C.J.); *Gardner* v. *Florida*, 430 U.S. 349, 357-358 (1977). Third, respondent's sentencing proceeding was before a judge, not a jury as in *Bullington*.[3] Thus, the second sentencing proceeding after remand could be held before the same factfinder and would not deprive the defendant of his " 'valued right to have his trial completed by a particular tribunal.' " *United States.* v. *Dinitz*, 424 U.S. 600, 606 (1976), quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). See also Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1011-1023 (1980); but see *United States* v. *Jenkins*, 420 U.S. 358, 368-370 (1975). Finally, because the Missouri statute requires a finding of certain aggravating circumstances in connection with the charged crime, the life sentence in *Bullington* is more easily characterized as an "implied acquittal" of a greater offense. See 451 U.S. at 445; cf. *Green* v. *United States*, 355 U.S. 184, 190-191 (1957).

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[3] The Texas statute does permit the sentencing proceeding to be held before a jury, but respondent elected to have it held before a judge.

On the other hand, with respect to what we believe is the most significant difference between *Bullington* and *DiFrancesco*, this case is akin to *Bullington*. The overriding objective of the Double Jeopardy Clause is to guard against "[g]overnment oppression." *United States* v. *Scott*, 437 U.S. 82, 99 (1978). More particularly, the Clause requires that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby * * * enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, *supra*, 355 U.S. at 187-188. On the other hand, the prosecution is ordinarily entitled to "one full and fair opportunity" to present its evidence to the factfinder. *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978). No "government oppression" is involved when the prosecution seeks only one error-free opportunity to convict the defendant. Thus, the government may be allowed, consistent with the Double Jeopardy Clause, to pursue a second prosecution where the first trial was infected with legal error and did not result in an acquittal. See, *e.g.*, *United States* v. *Scott*, *supra*; *United States* v. *Ball*, 163 U.S. 662 (1896). But when the first trial is free from error, there is ordinarily no government interest that warrants subjecting the defendant to relitigation of issues resolved by the first trial; such a "second bite at the apple" is precisely the government oppression that is barred by the Double Jeopardy Clause. See, *e.g.*, *Burks* v. *United States*, *supra*, 437 U.S. at 16; cf. *Ashe* v. *Swenson*, 397 U.S. 436 (1970); *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937).

These principles are manifested in the sentencing area by *DiFrancesco* and *Bullington*. In *DiFrancesco*, the Court emphasized that, under 18 U.S.C. 3576,

"[t]he appellate court * * * is empowered to correct only a legal error." 449 U.S. at 141. If the district court's sentence was legally erroneous, it was not constitutionally entitled to finality, and the prosecution had a strong and legitimate interest in being permitted to appeal it in order to get one fair opportunity to have the defendant sentenced correctly. In *Bullington*, by contrast, there was no contention that there had been any error prejudicial to the State in the first sentencing proceeding, which resulted in a life sentence. Thus, the State had no legitimate interest in defeating the finality of that sentence and getting a second opportunity at the death penalty in a new proceeding (see 451 U.S. at 446); the error-free sentence was entitled to "*res judicata*" effect.[4]

Indeed, if *Bullington* were a civil case, it would be clear that the error-free sentencing proceeding would be *res judicata* even where another portion of the

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[4] *Bullington* is consistent with *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Stroud* v. *United States*, 251 U.S. 15 (1919), which hold that, in the case of traditional, nonbifurcated sentencing, the Double Jeopardy Clause does not prohibit the imposition of a higher sentence on retrial after a conviction is reversed. In those cases, the imposition of sentence is discretionary and is closely tied to the trial and based partly on facts adduced at the trial. Thus, when the "slate has been wiped clean" (*North Carolina* v. *Pearce*, *supra*, 395 U.S. at 721) and a new trial is held, there is an important interest in permitting the sentencer to base its sentence on the evidence adduced before it at the new trial. See Westen, *The Three Faces of Double Jeopardy*, *supra*, 78 Mich. L. Rev. at 1060-1061. Under the bifurcated procedure in *Bullington*, however, the sentencing proceeding is entirely separate from the trial, and the fact that a retrial on the issue of guilt or innocence is to be held provides no reason for discarding the result of a separate, error-free sentencing proceeding.

case—the determination of guilt—was reversed and remanded for retrial. Retrials in civil cases are routinely limited to single issues when other issues have been reliably determined by the first jury. See *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 497-499 (1931); Fed. R. Civ. P. 59; 6A *Moore's Federal Practice* ¶ 59.06 (2d ed. 1982). It stands to reason that a criminal defendant should be entitled to the same finality protection in this connection as a civil litigant.[5] In this important respect, the instant case is more like *Bullington* than *DiFrancesco*, because the State does not contend here that it was prejudiced by any legal error committed by the trial judge at the first sentencing proceeding.

Because the United States has no procedure precisely like the Texas procedure for enhancing sentences of habitual offenders, we have no substantial interest in whether, in light of the competing considerations outlined above, the specific Texas procedure is

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[5] Although *Bullington* involves the invocation of finality of the resolution of part of a case in favor of a criminal defendant, we believe that there is no reason why the same finality principle should not apply to issues that have been reliably resolved by the factfinder in a manner favorable to the prosecution. For example, where the only error underlying a defendant's conviction is that the jury was not properly instructed as to the differences between the greater and a lesser included offense, the case should be remanded for a retrial only on the question of which offense was committed. The question of guilt or innocence of at least the lesser offense, which was unaffected by the error and hence was reliably resolved by the first jury, should not be reopened. See Brief for the United States at 48-57 in *United States* v. *Gaddis*, No. 74-1141. Cf. *Brady* v. *Maryland*, 373 U.S. 83, 88-91 (1963) (case remanded for retrial solely on issue of punishment when improperly withheld evidence would not have been admissible on issue of guilt or innocence).

deemed sufficiently like the Missouri sentencing procedure involved in *Bullington* to render it subject to the principles of *Burks*. Accordingly, we take no position on that question. In our view, it is unnecessary for the Court to resolve that issue because, even assuming that *Burks* does apply to the Texas procedure, we believe the second sentencing proceeding on remand did not violate the Double Jeopardy Clause.

B. *Burks* Does Not Bar A Second Proceeding On Remand When The Evidentiary Deficiency Would Have Been Subject To Correction At The First Proceeding Had The Defendant Objected

In *Burks*, this Court held that the Double Jeopardy Clause prohibited the retrial of a defendant whose conviction was reversed on appeal for insufficient evidence. The rationale of the decision was straightforward. The Court explained (437 U.S. at 10-11; footnote omitted): "If the District Court had * * * held in the first instance [that the evidence was in fact insufficient], as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense." [6] Thus, "[t]he appellate decision unmistakably meant that the District Court had erred in failing to grant a judgment of acquittal" (*id.* at 11). The Court held therefore that the Double Jeopardy Clause required the appellate court to grant the defendant *the relief that should have been afforded by the trial court* by directing a judgment of acquittal. To do otherwise in the circumstances of *Burks* would have violated the most fundamental guarantee of the Double Jeopardy Clause against government op-

[6] The defendant had moved at trial for a judgment of acquittal. See 437 U.S. at 3.

pression by giving the prosecution a " 'second bite at the apple' " (*id.* at 17), namely, the "opportunity to supply evidence which it failed to muster in the first proceeding" (*id.* at 11; footnote omitted).

While *Burks* clearly bars a retrial when the prosecution has put on all of its available evidence at trial and that evidence is insufficient to support a conviction, it does not necessarily hold that the Double Jeopardy Clause would bar a retrial after every reversal that could be characterized as based on insufficiency of the evidence. The reason why insufficient evidence was introduced at the first proceeding is relevant in determining whether a second proceeding would constitute government oppression, and therefore whether a second proceeding may be permissible under the Double Jeopardy Clause.

Linam v. *Griffin*, *supra*, is illustrative. Linam was charged as an habitual criminal offender under a New Mexico statute similar to the Texas statute involved here. The State introduced evidence that he had previously been convicted of felonies in 1962, 1968, and 1973, although it did not introduce evidence of the dates on which the felonies were committed; the jury imposed an enhanced sentence of life imprisonment. On direct appeal, the New Mexico Supreme Court held for the first time that there could not be separate counting of prior felonies when one was committed before conviction for the other, and accordingly that the enhanced sentencing statute required proof that each felony was committed after the date of conviction for the preceding felony. *State* v. *Linam*, 93 N.M. 307, 600 P.2d 253, cert. denied, 444 U.S. 846 (1979). The court then concluded that the evidence at the first proceeding was insufficient to show the required pattern of conviction followed by the commission of felonies. Accordingly, the court

remanded for a new proceeding [7] at which Linam was again found to be an habitual offender and sentenced to life imprisonment. See generally *Linam* v. *Griffin*, *supra*, slip op. 2-4.

On appeal from denial of Linam's habeas corpus petition, the Tenth Circuit held that the second sentencing proceeding did not violate the Double Jeopardy Clause. The panel unanimously agreed that *Burks* did not bar the second proceeding even though the evidence at the first proceeding had been insufficient. Slip op. 7-11.[8] Clearly, the Double Jeopardy Clause was not violated because "the prosecution did not have a fair opportunity to put on its evidence." Concurring opinion of Anderson, J., at 8. Although the prosecution undoubtedly had in its possession evidence showing the dates of the commission of the felonies (see slip op. 10), it did not know that introduction of that evidence was necessary, and it would have been unreasonable not to give it the opportunity to introduce that evidence on remand.

The instant case falls somewhere in between *Linam* and *Burks*. Unlike *Burks* and like *Linam*, this is not a case in which the prosecution lacked sufficient evidence at the first trial to prove its case. Rather, it was only through an oversight—the failure of the prosecutor to ask the fingerprint expert whether respondent's prints matched those on the second con-

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[7] The New Mexico court found that jeopardy did not attach at the first sentencing proceeding and hence that there was no bar to a second proceeding. 93 N.M. at 310, 600 P.2d at 256.

[8] By a 2-1 vote, the panel also held in the alternative that the first sentence was not entitled to the same finality under the Double Jeopardy Clause as a determination of guilt or innocence. The majority distinguished *Bullington* and found *DiFrancesco* controlling. See slip op. 11-16.

viction record—that the available, sufficient evidence was not introduced. Thus, the principle that the prosecution should not be entitled to a "dry run" and then an opportunity to muster additional evidence at a second proceeding (see *Burks*, *supra*, 437 U.S. at 11) is not implicated here. On the other hand, unlike *Linam*, the prosecution was aware of the elements of the habitual offender statute that it needed to prove and thus can reasonably be held responsible for failing to present all of its evidence.

Despite the oversight by the prosecution here, *Burks* does not bar a retrial. The guiding principle of *Burks* is that the defendant is entitled to receive from the appellate court the relief that he should have received from the trial court. In *Burks*, the trial court should have granted the motion for a judgment of acquittal. Here, however, the court could not have granted such a motion because respondent made no motion in the trial court seeking relief on the basis of insufficient evidence. Moreover, had he made such a motion, a permissible course of action for the trial court (indeed, under the circumstances, the only reasonable one) would have been to reopen the record to permit the prosecution to supply the inadvertently omitted evidence; the trial court would not have been obliged to reject for insufficient evidence the prosecution's effort to obtain an enhanced sentence.

In the federal system, it is recognized that the district court generally has discretion to permit the government to reopen its case for the presentation of additional evidence. See, *e.g.*, *United States* v. *Cordero*, 668 F.2d 32, 44 (1st Cir. 1981); *United States* v. *McDonough*, 603 F.2d 19, 22 (7th Cir. 1979); *United States* v. *Powers*, 572 F.2d 146, 152-153 (8th Cir. 1978); *United States* v. *Sisack*, 527 F.2d 917, 919-

920 (9th Cir. 1975); *United States* v. *Wilcox*, 450 F.2d 1131, 1143 (5th Cir. 1971), cert. denied, 405 U.S. 917 (1972). With respect to the instant case, Texas law provides that "[t]he court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appears that it is necessary to a due administration of justice." Tex. Code Crim. Proc. Ann. Art. 36.02 (Vernon 1981). This has been interpreted to authorize reopening to remedy evidentiary deficiencies existing at the time the prosecution rests. See, *e.g.*, *Riley* v. *State*, 399 S.W. 2d 805 (Tex. Crim. App. 1966). *Duesterberg* v. *State*, 169 Tex. Crim. 137, 332 S.W. 2d 719 (1960), is closely analogous to the instant case. There the trial court reopened the trial in order to permit the prosecution to put on evidence, which it had forgotten to introduce, of the defendant's prior conviction that was alleged in the indictment.

The appellate court's order in this case remanding for a new trial makes clear its view that, as a matter of state law, it would have been proper for the trial court to reopen the first proceeding to permit the prosecutor to ask whether respondent's fingerprints matched those on the second conviction record, had it been realized that this required item of proof was lacking. The trial court's failure to reopen the record, or at least to consider the possibility, is directly ascribable to respondent's failure to object in the trial court to the sufficiency of the evidence. In short, whether deliberately or inadvertently, respondent effectively "sandbagged" the prosecution by failing to specify his objection to the sufficiency of the evidence until it was too late to remedy the defect at the first trial. Cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977). In these circumstances, *Burks* does not bar a second proceeding at which the prosecution is given

an opportunity to correct its oversight. *Burks* does not require the appellate court to direct a judgment of acquittal, because that is not the result that should have occurred in the trial court. Rather, *Burks* suggests that, where necessary evidence is omitted through an oversight and the defense fails to object and point out the deficiencies in the prosecution's proof, the proper remedy is a remand for a new proceeding; that is essentially the same result as the reopening of the record for additional evidence that the trial court could have ordered.[9]

Obviously, this case would stand on a different footing if respondent had raised a timely objection at the first sentencing proceeding. The trial court probably would have reopened the record, and the oversight would have been corrected at trial. If, however, the prosecution had failed to request the opportunity to augment its evidence, it would be reasonable to estop it from arguing that it should have the right to supply the missing evidence at a second proceeding, and *Burks* would bar a retrial.[10] But where the defendant, by withholding his objection until appeal, affords the trial court no notice of the possible evidentiary insufficiency and thereby deprives the court of the op-

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[9] This issue arises here in the context of sentencing, where the scope of double jeopardy protection is not as broad as for determinations of guilt or innocence. See generally *United States* v. *DiFrancesco*, *supra*. We believe, however, that the interpretation of *Burks* advanced here would be equally applicable to a determination of guilt or innocence.

[10] In *Elizalde* v. *State*, 507 S.W. 2d 749 (Tex. Crim. App. 1974), the defendant objected at the sentencing proceeding that the evidence of his habitual offender status was insufficient. The trial court disagreed, but the appellate court reversed and remanded for sentencing *on the record of the first proceeding*.

portunity to exercise its discretion to have all the available evidence introduced, he should not be heard to argue that the trial court should have entered an acquittal (or, as in this case, a finding that the sentence could not be enhanced).[11]

We emphasize that our contention here represents only a narrow exception to *Burks'* limitation on further proceedings. First, cases such as this one will arise quite infrequently, because defendants ordinarily will move for a judgment of acquittal in the trial court. Moreover, our submission is based on the principle that *Burks* requires only that the appellate court order the relief that the trial court could properly have ordered; we do not contend that respondent "waived" his objection to the evidentiary insufficiency by not making it at trial. Thus, for example, the re-

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[11] It is possible, of course, that had respondent objected at trial to the evidentiary omission, the trial court would have refused a prosecution request to reopen its case for the taking of additional evidence. In that event, however, the prosecution might have been able to defend against the claim of insufficiency by arguing that it had sufficient evidence at its disposal and that the trial court erred by refusing to permit its introduction. Cf. *Greene* v. *Massey*, 437 U.S. 19, 26 n.9 (1978) (leaving open the question whether a retrial is permitted when the prosecution actually introduces sufficient evidence, but the legally competent evidence is insufficient; the situation described above would involve the converse—where the evidence actually introduced was insufficient, but evidence offered and erroneously excluded would have been sufficient). Perhaps the prosecution could prevail in such a case only if it could show an abuse of discretion by the trial court in failing to reopen. In any event, because respondent failed to object, the trial court here was deprived of any opportunity to consider whether to reopen the record. The action of the appellate court establishes its view that reopening would have been proper.

sult in *Burks* itself would not likely have been different if the defendant had failed to move for a judgment of acquittal at trial. Because the prosecution almost certainly had introduced all the evidence it had available at the time, there would have been no point in reopening the record for the taking of additional evidence, and the prosecution would not have been prejudiced by a failure to object. In such circumstances, permitting a retrial would have allowed the prosecution to introduce evidence that it did not have on hand and available for use in the first proceeding, in contravention of the basic principles underlying the Double Jeopardy Clause. Where the prosecution has sufficient evidence available and fails to introduce a part of it because of an oversight, however, the defendant's failure to object and permit correction of the error at trial is highly significant and should estop him from arguing that he was legally entitled to a favorable disposition at the first trial and therefore that further proceedings would violate double jeopardy principles.[12]

The conclusion that a defendant may be subjected to a second sentencing proceeding when he failed to object in a timely fashion to a curable defect in the first proceeding is, of course, consistent with the or-

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[12] While it is clear enough in this case and in *Linam* that the prosecution had sufficient evidence available to it but failed to introduce it because of an oversight, we recognize that it will not always be easy to draw a line between such cases and cases like *Burks* in which there has been a true failure of proof. As a practical matter, this question will not arise very often because the defense generally will move for a judgment in its favor in the trial court, and the prosecution will then have the obligation to persuade the court that reopening of its case is justified, if indeed any failure of proof is merely due to oversight.

dinary rules of criminal procedure. Our judicial system generally attaches significance to a defendant's failure to raise an objection at the appropriate time. See, *e.g.*, Fed. R. Crim. P. 12(b), 52(b).[13] One of the primary justifications for this timely objection requirement is to give the trial court an opportunity to correct the error objected to before it is too late. See, *e.g.*, *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 88-91. That justification could not be more directly implicated than it is in this context, where the defendant's failure to object prevents the trial court from taking steps to permit the introduction of inadvertently omitted evidence. While this failure to object need not totally estop the defendant from challenging the insufficiency of the evidence,[14] it should estop him from claiming that there may not be a second proceeding because the evidence at the first was insufficient. A contrary rule would give the defendant an incentive to engage in "gamesmanship" that would "compro-

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[13] This is particularly true in the case of a failure to move for a judgment of acquittal in the trial court. The general rule is that where the defendant does not move for a judgment of acquittal at the close of trial, even if he made such a motion earlier, the sufficiency of the evidence is reviewable only to prevent "manifest miscarriage of justice." See, *e.g.*, *Government of the Canal Zone* v. *O'Calagan*, 580 F.2d 161, 164 (5th Cir. 1978); *United States* v. *Parrott*, 434 F.2d 294, 295 (10th Cir. 1970), cert. denied, 401 U.S. 979 (1971). Had this rule been applied by the Texas appellate court here, respondent would not have been entitled to a reversal at all on his direct appeal.

[14] But cf. *United States* v. *McDonough*, *supra*, 603 F.2d at 21-22 (defendant who does not mention venue when asked to be specific with respect to his grounds for seeking a judgment of acquittal waives right to challenge on appeal insufficiency of proof of venue).

mise the fundamental purpose of the trial to determine the merits of the charges." *United States* v. *McDonough*, *supra*, 603 F.2d at 23. See also *Bozza* v. *United States*, 330 U.S. 160, 166-167 (1947).[15]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[15] The principle we espouse here is not one of punishing defendants for procedural defaults, but simply of furthering the vital societal interest of fair criminal trials designed to end in just judgments. It therefore does not matter whether the procedural default was the result of deliberate calculation or of oversight. See *Engle* v. *Isaac*, No. 80-1430 (Apr. 15, 1982), slip op. 20.

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